(25,145)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 387.

UNION TRUST COMPANY, PETITIONER,

vs.

MINNIE KAHN GROSMAN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in November, A. D. 1915, at Fort Worth, Texas, before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable Emory Speer, District Judge:

MINNIE KAHN GROSMAN et al., Appellants,

versus

UNION TRUST COMPANY, Appellee.

b Be it remembered, that heretofore, to-wit, on the 30th day of September, A. D. 1915, a transcript of the record of the above styled cause, pursuant to an appeal from the District Court of the United States for the Northern District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2831, as follows:

c TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2831.

MINNIE KAHN GROSMAN et al., Appellants,

versus

UNION TRUST COMPANY, Appellee.

Appeal from the District Court of the United States for the Northern District of Texas.

[Original Record Filed Sep. 30, 1915.]

U. S. Circuit Court of Appeals, filed Oct. 14, 1915. Frank H. Mortimer, Clerk.

1 *Caption.*

Be it remembered, That at a term of the District Court of the United States, in the Fifth Circuit, and in and for the Northern District of Texas, at Dallas, begun and holden on the 10th day of May, A. D. 1915, and which term adjourned on the 8th day of July, A. D. 1915, the Honorable Edward R. Meek, United States District Judge for the Northern District of Texas, presiding, the following proceedings were had and the following cause came on for trial:

No. 2778. Equity.

UNION TRUST COMPANY

versus

HIRAM GROSMAN et al.

Affidavit for Writ of Attachment.

Filed October 2nd, 1914.

John W. Philp, being duly sworn, says under oath, that he is agent for the Union Trust Company, a corporation existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in the City of Chicago, State of Illinois, of which city and state it is a citizen and resident, plaintiff in the above entitled cause, and that the defendants Hiram Grosman & Company, a partnership composed of Hiram Grosman, and Mose Grosman, and the defendant Minnie Kahn Grosman, are justly indebted to the plaintiff in the sum of twenty-eight thousand ($28,000.00) dollars as follows: for principal, interest and attorney's fees upon a note for the sum of twenty-five thousand ($25,000.00) dollars signed, executed and delivered on May 23, 1914, with written guaranty
2 attached thereto and made a part thereof, which instruments are signed and executed by Hiram Grosman & Company, and by Mrs. Minnie Kahn Grosman, and that same is all past due.

That the defendant, Mrs. Minnie Kahn Grosman, is about to convert her property or a part thereof into money for the purpose of placing it beyond the reach of her creditors; that this attachment is not sued out for the purpose of injuring or harassing the defendant Mrs. Minnie Kahn Grosman, or any of the defendants, and that this plaintiff will probably lose its debts unless such attachment is issued.

JNO. W. PHILP,
Agent for the Union Trust Company, Plaintiff.

STATE OF TEXAS,
County of Dallas:

Before the undersigned authority on this day personally appeared John W. Philp, who after being by me duly sworn, deposes and says

under oath *and* he is the agent of the Union Trust Company, plaintiff in the cause of the Union Trust Company vs. Hiram Grosman et al., pending in the United States District Court for the Northern District of Texas, and that the facts hereinbefore stated are within his knowledge true and correct and that each and all of the facts hereinbefore stated are true.

JNO. W. PHILP.

Sworn to and subscribed before me this the 2nd day of October 1914.

[SEAL.]

H. C. JARREL,
Notary Public, Dallas County, Texas.

Attachment Bond.

Approved and Filed October 2nd, 1914.

3 We, the undersigned, Union Trust Company as principal, and the other subscribers as sureties, acknowledge ourselves bound to pay to Mrs. Minnie Kahn Grosman and Hiram Grosman and Mose Grosman, jointly and severally the sum of fifty-eight thousand ($58,000.00) dollars.

Conditioned that the above bound Union Trust Company, plaintiff in attachment against the said Hiram Grosman & Company and Hiram Grosman and Mose Grosman and Mrs. Minnie Kahn Grosman, defendants shall prosecute its suit to effect and that it will pay all such damages and costs as shall be adjudged against it for wrongfully suing out such attachment.

UNION TRUST COMPANY,
By WM. H. ATWELL,
Its Attorney.
UNITED STATES FIDELITY & GUARANTY CO.,
By MABRY SEAY,
Attorney in Fact. [SEAL.]

Examined and approved on this the 2nd day of October A. D. 1914.

LOUIS C. MAYNARD,
Clerk U. S. District Court for the Northern District of Texas.

Attachment and Marshal's Return.

Issued October 2nd, 1914.

In the District Court of the United States for the Northern District of Texas, at Dallas.

The President of the United States to the Marshal of the United States for the Northern District of Texas, Greeting:

You are hereby commanded, to attach forthwith so much
4 of the property of Hiram Grosman & Company, Hiram Grosman, Mose Grosman and Minnie Kahn Grosman, if to be found in your district, repleviable on security, as shall be of value sufficient to make the sum of twenty-eight thousand dollars and no cents, ($28,000.00) and the probable cost of suit to satisfy the demand of the Union Trust Company and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon, to be had before the Honorable District Court of the United States, for said Circuit and District at Dallas, Texas, at a Term thereof to commence on the 2d Monday, it being the 11th day of January, A. D. 1915, when and where you shall make known how you have executed this Writ.

Witness, the Honorable Edward R. Meek, Judge of the District Court of the United States, and the Seal of the said District Court at Dallas, Texas, this 2d day of October, A. D. 1914, and of the American Independence the 139 year.

[SEAL.] LOUIS C. MAYNARD,
Clerk of said Circuit Court.

Marshal's Return.

Came to hand on this the 2nd day of October A. D. 1914, at 10:50 A. M., and executed by levying upon the following described real estate situated in the city and county of Dallas and state of Texas as property of Mrs. Minnie Kahn Grosman, to-wit:

Lot No. 1 and the east half of Lot No. 2, in Block 78/123, according to the official map of the city of Dallas and being 75 x 100 feet at the southwest corner of Ray and Commerce streets in the said city of Dallas, and being the same property transferred by the Oriental Investment Company to Mrs. Minnie Kahn Grosman on December 26th, 1912, as shown by the Deed Records of Dallas county Texas; also part of Block 1130-3, according to the official map of the city of
Dallas, beginning at a stake in the S. W. Line of Ervay
5 street, the E. corner of Lot 12, in said Block, according to Alexander's Revised Plot of Fetzer's Addition; thence S. W. with the S. E. line of a triangular lot conveyed to Mrs. R. A. Bolanz by L. A. Shumard on January 15th, 1902, a distance of 184 8/10 feet, more or less, to a stake in N. E. line of an alley; thence N. W.

with the N. E. line of said alley 50 feet to a stake; thence N. E. with the N. W. line of Lot 12, to a stake in the S. W. line of Ervay street 184 7/10 feet; thence S. E. with said street 50 feet to the place of beginning.

Witness my hand this the 2nd day of October A. D. 1914.

W. J. McDONALD,
United States Marshal, N. D. T.,
By L. B. FARISH, *Deputy.*

[Indorsed on back:] Marshal's Docket No. 3314. No. 2778 Eq. In the United States District Court, Dallas, Texas, Union Trust Company, vs. Hiram Grosman, et al. Attachment. Issued Oct. 2d, 1914, Louis C. Maynard, Clerk, by — ———, Deputy. Returned and filed Oct. 16, 1914, Louis C. Maynard, Clerk.

Plaintiff's Original Complaint.

Filed October 2nd, 1914.

To the Honorable Edward R. Meek, Judge:

Union Trust Company, hereinafter called plaintiff, complains of Hiram Grosman & Company and Minnie Kahn Grosman and Hiram Grosman and Mose Grosman, hereinafter called defendants, and represents to your Honor that the plaintiff, Union Trust Company, is a citizen of the State of Illinois and is a corporation existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in Chicago, Illinois, engaged in the banking business, and that the defendant Hiram Grosman & Company, a partnership consisting and composed of Hiram Grosman and Mose Grosman, and all of the parties defendant are residents and citizens and inhabitants of the Dallas County within the Dallas Division of the Northern District of the State of Texas.

6

II.

That heretofore, to-wit: on the 23rd day of May, A. D. 1914, the defendants Hiram Grosman & Company, partnership as aforesaid, executed and delivered to this plaintiff, by and through Hiram Grosman, for a valuable consideration, their certain written obligation to pay and promissory note dated Chicago, Illinois, May 23, 1914, for the sum of twenty-five thousand ($25,000.00) dollars, due four months after date thereof and payable to the order of the Union Trust Company at its office in Chicago, with seven per cent interest thereon after due until paid, together with all costs or expenses paid or incurred in collecting the same, said note also providing further upon its face and therein and thereby pledging and transferring and depositing to and with this plaintiff, said Union Trust Company, as collateral security for the payment of said note and of all other liabilities of the signers and makers thereof, certain personal property, to-wit: 198 shares of the Grosman Company, Incorporated stock,

being certificates No. 15 for 48 shares and No. 16 for 150 shares; also 600 shares of the Northern Texas Utilities Company preferred and being certificates Nos. 13, 15 and 17 for 200 shares each, and at the said time and at the special instance and request of her husband, Hiram Grosman, and for his accommodation, and being joined with him therein, the defendant Minnie Kahn Grosman signed, executed and delivered simultaneously with the signing, execution and delivery of the aforsaid promissory note payable as aforesaid, and as a part thereof and of even date therewith, a written guaranty wherein and whereby she, the said Minnie Kahn Grosman, guaranteed unconditionally and at all times during the continuance thereof, the
7 full and prompt payment unto this plaintiff, Union Trust Company, the principal and interest as the same became due, or as the same became payable the said hereinbefore mentioned promissory note for the sum of twenty-five thousand ($25,000.00) dollars, which said instrument of guaranty was then and there as aforesaid signed by the defendant Minnie Kahn Grosman, joined by her husband in the manner aforesaid, and delivered on May 23, 1914, as aforesaid, to this plaintiff, the same said paper then and there being executed, signed and delivered by the aforesaid defendant to this plaintiff in the city of Chicago, State of Illinois, on the said day and date of May A. D. 1914.

That said promissory note for the sum of $25,000.00 was signed as aforesaid by Hiram Grosman & Company by Hiram Grosman.

That thereafter on August 17, 1914, the defendants Hiram Grosman & Company, partnership as aforesaid, composed as aforesaid, by and through Hiram Grosman, signed, executed and delivered to this plaintiff for a valuable consideration its and their certain promissory note in writing dated Chicago, Illinois, August 17, 1914, for the sum of thirty four hundred and four and 6/100 ($3,404.06) dollars due on September 23, 1914, and payable to the order of the Union Trust Company at its office in Chicago, with interest at the rate of seven per cent per annum from date until paid and signed Hiram Grosman & Company by Hiram Grosman.

That said note further provided on its face and pledged therewith and thereon and deposited with and delivered to this plaintiff therewith as collatera-: [collateral] security for the payment of the *payment of the* said obligation the following personal property, to-wit: 198 shares of The Grosman Company, Incorporated, stock, 100 shares of the Northern Texas Utilities common stock and 710 shares of the Northern Texas Utilities preferred stock.

That this plaintiff is the legal and equitable owner and holder of the said notes and contract and each and all of the same and the same have not been paid either in whole or in part and default has
8 been made in the payment of the same by the defendants and each and all of them, and the same were in fact and each and all of them protested for non payment at a cost of — dollars on the — day of September, A. D. 1914.

Plaintiff shows that by reason of the signing, execution and delivery of the aforesaid promissory notes, and each of them, the defendants and each of them became liable and promised to pay this

plaintiff the principal, interest, protest fees and reasonable attorney's fees therein and therefor provided.

III.

That the said twenty-five thousand ($25,000.00) note and the guaranty and security thereof in writing by the defendant, Minnie Kahn Grosman, was one and the same transaction and the same contract, wherein and whereby the defendant Hiram Grossman, the husband of the defendant, Minnie Kahn Grosman, joined with her, the said Mrs. Minnie Kahn Grosman, in signing, executing and delivering the said contract of surety and guaranty, wherein and whereby the defendant Mrs. Minnie Kahn Grosman became liable and promised to pay this plaintiff the said $25,000.00 note, with all interest, protest fees, attorney's fees and cost of collecting thereof.

IV.

Plaintiff further represents that by the terms of said promissory notes and contracts and by the delivery to it of the personal property therein specified and hereinabove mentioned, a lien therein exists in its favor, to-wit: a lien to collaterally secure the payment of the said notes as herein shown, that is to say, a lien upon 198 shares of The Grosman Company, Incorporated, stock, there being 48 shares in certificate No. 15 and 150 shares in certificate No. 16; also 600 shares of the Northern Texas Utilities Company preferred and being certificates 13, 15, and 17 of 200 shares each, to secure the $25,000.00 note, which said shares of stock and personalty are also to
9 secure the thirty-four hundred and four and 6/100 ($3,-404.06) dollars note if any equity or balance there be arising from the sale of the said collateral security after the payment of the principal sum and charges arising under the $25,000.00 note, and an additional 100 shares of the Northern Texas Utilities common stock and an additional 110 shares of the Northern Texas Utilities preferred stock.

That by reason of the pledge of the said stock and all of it a lien exists thereon and thereto in favor of this plaintiff to secure it in the payment and settlement of the said notes in the order and form herein shown.

V.

That this plaintiff has no adequate remedy at law for the foreclosure of its lien as hereinbefore shown and will suffer irreparable loss unless equitable relief and remedy is offered it through the equity power of this Honorable Court.

VI.

That said personalty as hereinbefore described is not sufficient to pay the indebtedness hereinbefore shown.

VII.

Plaintiff represents that though often requested defendants and each of them have failed and refused and still fail and refuse to pay plaintiff the amount shown to be due it by reason of its ownership and holding of the aforesaid contracts, notes and promises to pay, to this plaintiff's damage in the sum of twenty-nine thousand ($29,000.00) dollars plus attorney's fees; and this plaintiff further represents that the said contracts and notes and agre-ments and promises in writing to pay, after the defendants' default were placed in the hands of William H. Atwell, an attorney-at-law at Dallas, Texas, for collection and appropriate court proceedings, and that a reasonable attorney's fee therein and therefor is the sum of twenty-five hundred ($2,500.00) dollars which amount, added to the aforesaid damage, makes the damages accruing to this plaintiff by reason of the defendants' defaults aforesaid to aggregate and the same do aggregate the sum of thirty-one thousand five hundred ($31,500.00) dollars. That two thousand ($2,000.00) dollars of said attorney's fees are reasonably and justly due under the $25,000.00 note and five hundred ($500.00) dollars of said attorney's fees are reasonably due under the said $3,404.06 note.

VIII.

Plaintiff further says that it requests and prays that the defendants and each of them answer herein, but that answer under oath is specifically waived, save and except unless the defendants or either of them desire to deny the execution of said instruments or either of them, in which respects oath is not waived.

Prayer.

Premises considered, plaintiff prays for subpœna to each of the defendants herein and that upon final and proper hearing it have judgment for its said debt and damages aggregating as aforesaid thirty-one thousand five hundred ($31,500.00) dollars, which is principal, interest and reasonable attorney's fees on the obligations aforesaid against the defendants Hiram Grosman and Mose Grosman, members of the partnership of Hiram Grosman & Company, as aforesaid; and also against Hiram Grosman & Company for the entire amount aforesaid, and against the defendant Mrs. Minnie Kahn Grosman for so much thereof as is represented by the $25,000.00 note and contract hereinbefore declared upon, which, by its terms, includes the $25,000.00 note and interest and $2,000.00 attorney's fees; and for a foreclosure of its lien upon the personal property stocks and shares of stock hereinbefore described, with appropriate orders for the application of such amount as may be realized therefrom upon the respective totals of the said notes, together with such remedies and rights as this plaintiff may

be entitled to with any and all other equitable relief and for all costs of this proceeding, for which it shall ever pray.

WM. H. ATWELL,
Solicitor for the Plaintiff,
UNION TRUST CO., *Plaintiff,*
By WILLIAM H. ATWELL,
Its Solicitor of Record.

STATE OF TEXAS,
County of Dallas:

Before me the undersigned authority on this day personally appeared William H. Atwell, who says under oath that in his judgment the foregoing bill alleges and constitutes an equitable cause of action against the defendants as therein set forth and that the matters of fact therein stated are true, to the best of his knowledge and belief.

WM. H. ATWELL.

Sworn to and subscribed before me on this the 2nd day of October, A. D. 1914.

[SEAL.] H. C. JARREL,
Notary Public, Dallas County, Texas.

Filed October 2nd, 1914.

Motion of Minnie Kahn Grosman to Dismiss Bill as to Her.

Filed October 20th, 1914.

Now comes Minnie Kahn Grosman, joined herein pro forma by her husband, Hiram Grosman, defendant in the above numbered and entitled cause, and moves the Court to dismiss the plaintiff's original bill herein as to the said defendant, Minnie Kahn Grosman, because it manifestly appears on the face of said bill that at the time the said Minnie Kahn Grosman signed the writing ob-
12 ligatory therein sued on she was, as she still is, a married woman enjoying the protection of coverture.

Wherefore said defendant prays that said bill be dismissed and she go hence without day and recover her costs; and as in duty bound will ever pray.

MINNIE KAHN GROSMAN,
HIRAM GROSMAN,
Defendants,
By ETHERIDGE, McCORMICK & BROMBERG,
Their Solicitors.

Filed and entered October 20th, 1914.

Joint and Several Answers of Hiram Grosman and Mose Grosman.

Filed October 20th, 1914.

Now come Hiram Grosman and Mose Grosman, partners doing business under the firm name of Hiram Grosman & Company, and file this their joint and several answer- to the plaintiff's original bill herein exhibited and say:

1. That they admit the allegations of fact contained in the first paragraph of the plaintiff's bill.

2. They admit the allegations of fact contained in the second paragraph of the plaintiff's bill.

3. They admit the allegations of fact contained in the third paragraph of plaintiff's bill.

4. They admit the allegations of fact contained in the fourth paragraph of the plaintiff's bill.

13 5. They admit the allegations of fact contained in the fifth paragraph of the plaintiff's bill.

6. These defendants deny the allegations of fact set forth in the sixth paragraph of plaintiff's bill and aver that the personal property now held by the plaintiff in pledge is in value more than sufficient to pay the plaintiff's whole indebtedness.

7. They admit the allegations of fact contained in the seventh paragraph of the plaintiff's bill.

8. Having fully answered herein, defendants pray to be discharged with their costs.

HIRAM GROSMAN,
MOSE GROSMAN,
Defendants.
By ETHERIDGE, McCORMICK & BROMBERG,
Their Solicitors.

Filed October 20th, 1914.

Plaintiff's First Supplemental Petition.

Filed February 17th, 1915.

To the Honorable Edward R. Meek, Judge:

First having obtained leave of the Court, and with the permission of counsel for the defendants, the plaintiff alleges by way of supplemental petition:

1. That at the time of the execution and delivery of the $25,000.00 promissory note mentioned in paragraph 2 and paragraph 3 of plaintiff's o inal complaint, the defendants, Mrs. Minnie Kahn Grosman and her husband, Hiram Grosman, were then and there

in Chicago, within the State of Illinois, and personally de-
14 livered the said note and the guarantee thereof within the
state of Illinois to this place to induce plaintiff to lend the
money to them.

2. That the personal property mentioned in said original complaint and known as certificates numbers 13, 15 and 17 for 200 shares each and certificate No. 22 for 50 shares and certificate No. 23 for 60 shares preferred stock of the Northern Texas Utilities Company was, on the 1st day of February A. D. 1915, desired by the defendants and the plaintiff was willing that the defendants should have and be re-possesses of the said personal property without loss or hazard to it, and thereupon, by mutual agreement, the said personal property, with the said understanding, was delivered to the said defendants, and bonds numbered 1 to 64 inclusive, of the Northern Texas Utilities Company of the face value of $25,000.00 issued under the deed of trust dated the 1st day of November, A. D. 1914, were delivered to this plaintiff in the place of the personal property hereinbefore mentioned, and as collateral security to the notes sued upon and mentioned in the original bill of complaint, and all the remedies sought therein may be by agreement asserted against and claimed against the substituted securities as is more particularly evidenced by Exhibit A hereto attached and made a part hereof, which is an instrument executed by all of the defendants on the 1st day of February, A. D. 1915.

3. Plaintiff further represents, in replication to the motion of Mrs. Minnie Kahn Grosman filed herein on October 20, 1914, that though the said Mrs. Minnie Kahn Grosman be a married woman, yet under the laws of the state of Illinois, she is authorized in her own name to make contracts and incur liabilities and sue and be sued, and manage, sell and convey her real and personal property the same as though she were a feme sole, as is more particularly shown and indicated in the revised statutes of the State of Illinois, which are herein specifically plead, and which were in force and
were the law of the said State of Illinois at the time of the
15 making, execution and delivery of the notes and contracts
presented to this plaintiff for the securing of money thereon, payable in the State of Illinois, and presented to this plaintiff, as aforesaid, by Mrs. Minnie Kahn Grosman and her husband in the state of Illinois, to-wit: Sections 6, 5 and 9 of Hurd's Revised Statutes of Illinois, 1911, being Chapter 68 as brought from the Act of 1874, as follows:

Sec. 6. Contracts may be made and liabilities incurred by a wife and the same enforced against her, to the same extent and in the same manner as if she were unmarried; but except with the consent of her husband she may not enter into or carry on any partnership business, unless her husband has abandoned or deserted her, or idiotic or insane or is confined to the penitentiary.

Sec. 5. That a married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment in such action may be enforced by or against her as if she were a single woman.

Sec. 9. A married woman may own, in her own right, real and personal property obtained by descent, gift or purchase, and manage, sell and convey the same, to the same extent and in the same manner that her husband can property belonging to him. (Proviso relating to transfers of goods and chattels between husband and wife.)

By reason of all of which the said defendant, Mrs. Minnie Kahn Grosman was under no inhibition as a married woman in the state of Illinois where the said contract was entered into and delivered and where the same is payable and therefore she becomes bound in law, equity and good conscience thereby.

Wherefore plaintiff prays as in its original complaint.

WM. H. ATWELL,
Attorney for Plaintiff.

16 Sworn and subscribed by W. H. Atwell, who states under oath that he is the attorney for the plaintiff and that the matters of fact hereinbefore alleged are, upon his information and belief, true and correct and he believes the same to be true and correct.

Witness my hand and official seal this the 16th day of February, A. D. 1915.

[SEAL.]

L. B. AVEILHE,
Notary Public, Dallas County, Texas.

EXHIBIT A.

STATE OF TEXAS,
County of Dallas:

Whereas, it is the desire of Hiram Grosman & Co., and Minnie Kahn Grosman, joined by her husband Hiram Grosman, and Mose Grosman, defendants in the case of Union Trust Company vs. Hiram Grosman et al., No. 2778 Equity, pending in the United States District Court for the Northern District of Texas, to be re-possessed of the six hundred shares of preferred stock of the Northern Texas Utilities Company, being certificates Nos. 13, 15 and 17 for two hundred shares each, and certificate No. 22 for fifty shares and certificate No. 23 for sixty shares, which is held by the said plaintiff and upon which foreclosure is sought in the said cause; and whereas the plaintiff has no objection to returning the said stock to the defendants provided all of its rights are conserved and other security is substituted therefor; and whereas the said Hiram Grosman is the owner and holder of bonds Nos. 1 to 64 inclusive of the Northern Texas Utilities Company of the face value of $32,000.00 issued under deed of trust dated the 1st day of November, A. D. 1914;

Now, therefore, the said last mentioned personal property, to-wit: The said bonds numbered 1 to 64 inclusive in the said company, are hereby consigned, transferred and given into the possession of

the Union Trust Company, to secure any and all indebted-
17 ness and as collateral security to any and all indebtedness held by the said Union Trust Company against these defendants or either of them, such security being given in substitution for the preferred stock hereinbefore mentioned.

It is further expressly agreed and understood that this substitution shall not affect in any manner whatsoever the foreclosure proceedings numbered and pending as aforesaid in the said Court, but that foreclosure may be had on these substituted collaterals without further notice to us, the same as could have been had upon the preferred stock which is herewith turned over to us, had the plaintiff succeeded in its contentions in said suit.

In other words, this is a mere substitution of securities which shall not prejudice the plaintiff in any way whatsoever in its said cause or in its relief prayed, nor shall it release either one of us, expressly or by implication, from any guaranty or suretyship or obligation or indebtedness that the said Union Trust Company may hold against us or either of us.

And it is hereby agreed that such amendment to the plaintiff's foreclosure petition as its attorney may consider necessary may be filed in the form of a supplemental petition without further notice to us.

Witness our hands this the 1st day of February A. D. 1915.

HIRAM GROSMAN & CO.,
By HIRAM GROSMAN.
MINNIE KAHN GROSMAN.
MOSE GROSMAN.

STATE OF TEXAS,
County of Dallas:

Before men [me], the undersigned authority on this day personally appeared Mose Grosman and Hiram Grosman and Minnie Kahn Grosman, each of whom is well known to the undersigned authority and each of whom acknowledged to me that they each acknowledged the foregoing instrument for the purposes and
18 consideration therein expressed; and Minnie Kahn Grosman, wife of Hiram Grosman, having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Minnie Kahn Grosman, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Witness my hand and official seal, this the 1st day of February, A. D. 1915.

[SEAL.] H. L. BROMBERG,
Notary Public, Dallas County, Texas.

Filed February 17th, 1905.

Order Denying Motion of Minnie Kahn Grosman to Dismiss Bill as to Her.

Filed and Entered February 22nd, 1915.

This cause having been submitted on the motion of the defendant, Minnie Kahn Grosman, joined by her husband, to dismiss the plaintiff's bill as to her, and counsel for the plaintiff and defendant having appeared and argued the motion, and submitted briefs, and the same having been considered, the Court is of the opinion that the motion is insufficient in law;

It is therefore ordered, adjudged and decreed on this the 22nd day of February, A. D. 1915, that the motion to dismiss as to the defendant Minnie Kahn Grosman be in all things denied and overruled, to which the defendant, Minnie Kahn Grosman then and there, in open Court, excepted.

E. R. MEEK, *Judge.*

From Equity Journal 1, pages 123-4.

19 *Answer of Minnie Kahn Grosman.*

Filed February 27th, 1915.

Now comes Minnie Kahn Grosman, joined by her husband, Hiram Grosman, and files this her answer to the plaintiff's original bill herein exhibited, and says:

I.

That she admits the allegations of fact contained in the first paragraph of the plaintiff's bill.

II.

That she admits the allegations of fact contained in the second paragraph of the plaintiff's bill, and in connection therewith she alleges that at the time she executed the written guaranty described therein she was, and still is, a married woman, domiciled in the State of Texas, enjoying the exemptions of coverture under the laws of the State of her domicile, under the provisions of which said laws of the State of Texas the said written guaranty is not binding on this defendant nor on her property.

III.

That it is not admitted, as alleged in the third paragraph of the plaintiff's bill, that the purported contract of guaranty signed by this defendant was the same contract with the obligation signed by

her co-defendant herein, or either of them, but on the contrary she avers that the purported contract of guaranty signed by her was a separate document signed by her only, and that the only parties thereto were this defendant and the plaintiff. She admits that the consideration therefor was the loan of $25,000.00 by the plaintiff to her co-defendant as alleged and evidenced by the note for $25,000.00 described in plaintiff's bill.

20

IV.

She admits the allegations contained in the fourth paragraph of the plaintiff's bill.

V.

She admits the allegations of fact contained in the fifth paragraph of the plaintiff's bill.

VI.

She denies the allegations of fact set forth in the sixth paragraph of the plaintiff's bill, and avers that the personal property now held by the plaintiff in pledge is in value more than sufficient to pay the plaintiff's whole indebtedness and that the same should be subjected to said indebtedness before subjecting any of this defendant's property thereto, in any event.

VII.

She admits the allegations of fact contained in the seventh paragraph of the plaintiff's bill, except that she denies that plaintiff has ever agreed to pay an attorney's fee of $2,500.00 herein for the collection of said $25,000.00 note on which it is claimed she is guarantor, and she denies that the plaintiff has ever agreed to pay as much as $2,000.00 therefor; and she further denies that $2,500.00 is or that $2,000.00 is a reasonable attorney's fee for the collection of said $25,000.00 note.

VIII.

This defendant says that the plaintiff is not entitled to recover against her herein for the foreclosure of the pretended attachment lien which plaintiff pretends to have had issued in this cause and pretends to have had levied on certain of defendant's property, because this defendant says that no writ of attachment could properly issue as mesne process in this cause, because the action is one of equitable cognizance and is pending on the equity side of this Honorable Court, and that the affidavit for attachment herein was
21 improvidently filed, and the writ of attachment was improvidently issued and levied on this defendant's property described as follows:

Lot No. 1 and the east half of Lot No. 2 in Block No. 78/123 according to the official map of the City of Dallas, and being 75x100 feet at the southeast corner of Ray and Commerce streets in said city of Dallas, and being the same property conveyed by the Oriental Investment Company to Mrs. Minnie Kahn Grosman December 26, 1912, as shown by the deed records of Dallas county, Texas; and was also levied upon the second tract, described as follows:

Part of Block 1130-3 according to the official map of the City of Dallas; beginning at a stake in south-west line of Ervay street, the east corner of Lot 12 in said block according to Alexander's Revised Plot of Fetzer's Addition; thence southwest with the southeast line of a triangular lot conveyed to Mrs. R. A. Bolanz by L. A. Shumard on January 15, 1902, a distance of 184 8/10 feet more or less to a stake in the northeast line of an alley; thence northwest with the northeast line of said alley 50 feet to a stake; thence northeast with the northwest line of lot 12 to a stake in the southwest line of Ervay street 184 7/10 feet; thence southeast with said street to the place of beginning.

And this defendant further avers that the pretended levy of said pretended writ of attachment on said Lot 1 and east half of Lot 2 in Block 78/123 was and is void and of no effect to impress any lien thereon, because she avers, that at the time said pretended levy was made thereon, and before that time and continuously since the said levy there was and is on said lots a two-story building occupying the whole of said lot and half lot, fronting 75 feet on Commerce Street and running back 100 feet with Ray street, and at right angles to Commerce street, which said building had been for some time prior to the pretended levy of said pretended writ and was at the time of such levy and is now occupied by the husband of this de-
22 fendant, who is her co-defendant, Hiram Grosman, as a place to exercise his calling and business of a broker and dealer in stocks, bonds, real estate mortgages, notes, liens and investments; that her husband was then and is now the head of the family consisting of herself and this defendant, was prior to the pretended levying of said pretended writ and at the time thereof and is now making his living and livelihood through this business then and now carried on in said building on said property. That under and by virtue of the provisions of Sec. 51 of Art. 16 of the Constitution of the State of Texas the said business property constitutes and constituted at the time of said pretended levy thereon the business homestead of said Hiram Grosman, and under and by virtue of the provisions of Sec. 61 of said Art. 16 of said constitution the said homestead is protected from forced sale for the payment of such debts as are sued on by the plaintiff herein, and this defendant pleads the exemption of her said property guaranteed to her in the Constitution of the State of Texas.

IX.

Having fully answered herein the said defendant, Minnie Kahn Grosman, joined by her husband, Hiram Grosman, prays that the said attachment proceedings against her said property be quashed

and held for naught and the cloud on her property constituted thereby removed from her said property by the final decree in this cause and that she go hence without day and recover of the plaintiffs her costs in this behalf most wrongfully incurred, and as in duty bound will ever pray.

MINNIE KAHN GROSMAN,
Defendant.
HIRAM GROSMAN,
Pro forma Defendant,
By ETHERIDGE, McCORMICK & BROMBERG,
Their Solicitors.

Filed February 27th, 1915.

23 *Replication of Plaintiff to Answer of Mrs. Minnie Kahn Grosman.*

Filed May 12th, 1915.

To the Honorable Edward R. Meek, Judge:

Comes now the plaintiff and files this its replication, under leave of the Court, to the answer of the defendant Minnie Kahn Grosman, and says:

1. That the allegations of the defendant, Minnie Kahn Grosman in the second paragraph of her said answer that she was under coverture at the time she executed the written guaranty is an insufficient defence to this plaintiff's cause of action against her, for that the said written guaranty declared upon was signed, executed and delivered to this plaintiff in the State of Illinois, and was made by the defendants, Mrs. Grosman and her co-defendant, Hiram Grosman, for the express purpose of procuring from this plaintiff the large sum of money mentioned in its original complaint and that at such time the defendant, Mrs. Grosman, and her husband were in the State of Illinois, and all of the negotiations were had in said state, and that the contract for the return of said money and the payment of said indebtedness was payable in said State of Illinois.

2. The plaintiff says that the allegations made by the defendant, Mrs. Grosman, in the third paragraph of her answer is inaccurate in that it alleges that the contract signed by her was a separate contract from that signed by her husband, the fact being that both instruments were signed and delivered simultaneously to this plaintiff and were considered by all the parties thereto as one and the same contract, for the securing of the large sum of money mentioned therein.

3. Plaintiff traverses paragraph 6 of defendant, Mrs. Gros-
24 man's answer, and says that it is untrue that the personal property pledged with this plaintiff and upon which a foreclosure is sought is sufficient in full to pay off and satisfy this plaintiff's claim against the defendants.

4. Plaintiff denies that portion of defendant, Mrs. Grosman's answer numbered 7 and says that it contracted with William H. Atwell, an attorney-at-law, to bring the instant action for it and agreed to pay him therefor a reasonable attorney's fee, and that such reasonable attorney's fee is the sum of $2,500.00, in the manner and form as claimed in its original complaint and that the defendants and each and all of them are bounden to pay the same by virtue of the obligations declared upon by this plaintiff.

5. Replying to that portion of the defendant, Mrs. Grosman's answer which is known as paragraph 8, wherein the said Mrs. Grosman alleges that no writ of attachment could properly issue as mesne process in an equitable cause, this plaintiff shows that such process is allowable under the rules of this honorable Court, and is permissible for the reason that the property upon which foreclosure is sought primarily is insufficient to satisfy the demands of this plaintiff, and plaintiff shows that by reason of the levy of said writ of attachment it has a valid and existing lien upon the property therein attached, and for the foreclosure of such lien it prays after the personal property upon which it has a lien, as shown in its original complaint, is exhausted, and it further prays that the proceeds arising from the sale of such attached property shall be disposed of as this honorable Court may further order.

6. Making further answer to that praagraph of the defendant, Mrs. Grosman's answer, which is numbered paragraph 8, wherein it is claimed that lot 1 and the east half of lot 2 in Block 78/123 is and was at the time of the levy of the writ of attachment the business homestead of her co-defendant, Hiram Grosman, and therefore not subject to forced sale by reason of the prohibitions of the Constitution of the State of Texas, this plaintiff says: This plaintiff denies that the said property is, was, or could have been the business homestead of Hiram Grosman, the consort of the defendant, Mrs. Minnie Kahn Grosman, for the reasons (*a*) that the title thereto was never in the said Hiram Grosman prior to said levy but was in fact the separate property of the defendant, Mrs. Minnie Kahn Grosman; and (*b*) because the said Hiram Grosman and Mrs. Minnie Kahn Grosman had an urban homestead and place or residence on south Ervay street, in the City of Dallas of the value of more than five thousand dollars at the time of its designation, as such, to-wit: A part of lot 10 and all of lot 11 in Block 1130/3 in said City of Dallas, upon which the said Hiram Grosman and his wife, Mrs. Minnie Kahn Grosman, resided, and that therefore there could be no business homestead as claimed by the defendant; and (*c*) the said Commerce street property, in the City of Dallas, had never been occupied by the said Hiram Grosman and is not now occupied by the said Hiram Grosman; and (*d*) because the said Commerce street property is a large business lot of the value of $50,000.00, with a large office building thereon made up of many apartments and compartments and built exclusively for rental purposes, and not for any temporary rentals, nor as a place for the carrying on of any sort of business by the said Hiram Grosman as in said answer contended; and that as a matter of fact said building was

not completed at the time of the levy of the writ of attachment herein, nor was there any occupant in any part thereof; and (*e*) because the said Hiram Grosman has his office and place of business in the Commonwealth Building of Dallas, Texas, where he carried on his business, calling and avocation; and (*f*) the said title to the said Commerce Street property upon which the writ of attachment was levied has never been either legally or equitably in the said Hiram Grosman, but was in the said Mrs. Minnie Grosman as her separate property, and the said Mrs. Minnie Kahn Grosman cannot claim a business homestead for her husband.

26 7. Wherefore, plaintiff prays as in its original bill and supplemental bill for judgment foreclosing upon the personal property therein mentioned and the application of the proceeds thereof, so far as they may go, to the payment of the liability of these defendants to this plaintiff, and for such deficit, plaintiff prays a foreclosure of its attachment lien upon the property shown in the return of the United States Marshal and set forth by metes and bounds and numbers in the original answer of Mrs. Minnie Kahn Grosman, and for reasonable attorney's fees in the sum of $2,500.00 and for all costs of this suit and for such other relief as it may be entitled to carry out the decrees and judgments rendered and to be rendered in equity.

WM. H. ATWELL,
Attorney for the Plaintiff.

Filed May 12th, 1915.

Plaintiff's Amendment to Sec. 6 of its Replication Filed May 12, 1915.

Filed June 25th, 1915.

Comes now the plaintiff, and after having obtained leave of the Court, files this its amendment to its replication to answer of the defendant, Mrs. Minnie Kahn Grosman, which replication was filed May 12, 1915, and for such amendment desires to add to and does hereby add to paragraph 6 of such replication the following, to-wit:

Plaintiff further shows that the claim of the defendants to the Commerce-Ray street lot is made for the fraudulent purpose of placing the said property beyond the reach of their creditors and particularly beyond the reach of this plaintiff, and without any intention upon the part of the defendants or either of them to use the said

27 property in good faith for homestead purposes or as a place to exercise the business or calling of the head of the family and further, this plaintiff shows that the said property so claimed as a homestead is a valuable lot reasonably worth the sum of $187,000.00, upon which a large office building has been erected with a deep basement calculated to carry a ten-story building, and that such improvements are reasonably worth the sum of $60,000.00, and that said property is not reasonably adapted for the business that de-

fendants claim to be engaged in and is not necessary for the purposes of such business of calling.

Plaintiff prays for subjection of any excess in event the Court finds or holds otherwise on its homestead contention, sufficient to satisfy any balance that may remain after sale of collatera-; [collateral] as prayed for herein.

WM. H. ATWELL,
Attorney for Plaintiff.

Filed June 25, 1915.

Amendment to Answer of Minnie Kahn Grosman.

Filed June 25th, 1915.

Now comes Minnie Kahn Grosman, joined by her husband, Hiram Grosman, leave of the Court being had so to do, and files this her amendment to her answer herein filed on February 27, 1915, and for amendment to said answer adds to paragraph 2 thereof the following allegations, to-wit:

This defendants avers that the pretended obligation made the basis of this suit, as against this defendant, was not executed by her for necessaries furnished her or her children, or for the benefit of her separate estate. And this defendant further avers that her disability of coverture has never been by any judgment of Court, or otherwise, removed; and that prior and at the time of, and ever since the
28 date of the alleged obligation upon which she is sued herein she continuously labored under the disability of coverture; and this defendant further avers that she was never either a resident or citizen of the state of Illinois, and she alleges the fact to be tha she is and ever since her birth has continuously been a resident ano citizen of the state of Texas; and she further avers that the execution by her of the purported written obligation made the basis of this suit, as against her, is prohibited by the laws of the state of Texas, and she, therefore avers that she is not liable thereon.

MINNIE KAHN GROSMAN,
Defendant.
HIRAM GROSMAN,
Pro Forma Defendant.
By F. M. ETHERIDGE,
J. M. McCORMICK,
H. L. BROMBERG,
Their Solicitors.

Filed June 25th, 1915.

Final Decree.

Filed and entered July 3rd, 1915.

This cause came on to be heard on July 1, 1915, at this term, and was argued by counsel; and thereeupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

That the plaintiff, Union Trust Company, a private corporation, duly organized and existing under the laws of the State of Illinois, do have and recover of and from Hiram Grosman & Company, a co-partnership composed of Hiram Grosman and Mose Grosman, and of Hiram Grosman and of Mose Grosman, jointly and severally, the sum of twenty-two thousand, seven hundred and forty-seven
29 dollars and fifty-five cents ($22,747.55) with interest thereon from this date at the rate of seven per cent (7%) per annum, and all costs of suit.

It further appearing that the defendant, Minnie Kahn Grosman, wife of the defendant, Hiram Grosman, is liable to the said plaintiff upon her contract of guaranty for the indebtedness of the said co-partnership of Hiram Grosman & Company and of Hiram Grosman and of Mose Grosman; it is further ordered, adjudged and decreed as follows:

That the said plaintiff, Union Trust Company, do have and recover of and from the said defendant, Minnie Kahn Grosman the sum of eighteen thousand, seven hundred sixty-two dollars ($18,-762.00) with interest thereon from this date at the rate of six per cent (6%) per annum.

The said amount herein adjudged in favor of the plaintiff against the said co-partnership of Hiram Grosman & Company and the said members thereof, to-wit: Hiram Grosman and Mose Grosman, is the aggregate of the amount due upon the two (2) promissory notes sued upon herein, less a credit of nine thousand, seven hundred fifty ($9,750.00) dollars, at which figure the said plaintiff, by agreement with the said defendant, in open Court, which agreement the Court then and there approved, on account of the taking over by the said plaintiff of certain collateral stocks, bonds and shares which were hypothecated by the said defendants with the said plaintiff, and which are specifically mentioned in the pleadings and agreement on file in this cause.

And the said amount so adjudged in favor of the said plaintiff and against the said defendants, Minnie Kahn Grosman, is to-wit, the amount of her guaranty, twenty-five thousand ($25,000.00) dollars, plus two thousand ($2,000.00) dollars adjudged against her as attorney's fees, less a credit of eight thousand, two hundred thirty-eight ($8,238.00) dollars, being the proportionate share of
30 the said collateral stocks, bonds and shares above mentioned, to which she is entitled as a credit.

It is further ordered, adjudged and decreed that process first issue for the collection of this judgment against the said partnership of

Hiram Grosman & Company and the said members thereof, to-wit, Hiram Grosman and Mose Grosman; and

It is further ordered, adjudged and decreed that as the said defendant, Minnie Kahn Grosman is the guarantor or surety of the said co-partnership of Hiram Grosman & Company and the said members thereof, to-wit: Hiram Grosman, she shall be subrogated to the rights of the said plaintiff herein as against the said Hiram Grosman & Company, Hiram Grosman and Mose Grosman, in the event she should pay this judgment, *or* in the event the collection of this judgment should be enforced as against her or her separate property.

It further appears that on the 2nd day of October, 1914, a writ of attachment duly issued out of this Court in this cause; and that thereafter on the 2nd day of October, 1914, said attachment was duly levied upon the following described tract or parcel of land situated in the city and county of Dallas, state of Texas, and more particularly described as follows, to-wit:

Lot No. 1 and the east half of Lot No. 2 in Block 78-123, according to the official map of the City of Dallas and being 75 x 100 feet at the southwest corner of Ray and Commerce Streets, in the said City of Dallas, and being the same property transferred by the Oriental Investment Co. to Mrs. Minnie Kahn Grosman on Dec. 26, 1912, as shown by the deed records of Dallas County, Texas; also part of Block 1130-C according to the official map of the City of Dallas, beginning at a stake in the southwest line of Ervay street, the east corner of Lot 12 in said Block, according to Alexander's revised plat of Fetzer's addition; thence southwest with the southeast line
31 of a triangular lot conveyed to Mrs. R. A. Bolanz by L. A. Schumard on Jan. 15, 1902, a distance of 184.8 feet more or less to a stake in the northeast line of an alley; thence northwest with the northeast line of said alley 50 feet to a stake; thence northeast with the northwest line of lot 12 to a stake in the southwest line of Ervay street 184.7 feet; thence southeast with said street 50 feet to the place of beginning. Both of said lots of real estate being situated in the City and county of Dallas, and State of Texas, and being attached as the separate property of the defendant, Mrs. Minnie Kahn Grosman, on the second day of October, A. D. 1914, at 10:50 o'clock in the morning, the date and time of the levy of the writ of attachment thereon in this cause.

And it appearing to the Court that the said property, upon which the said writ of attachment was levied, constituted the separate property of the said defendant, Minnie Kahn Grosman and that same was and is liable to the said writ of attachment:

It is therefore ordered, adjudged and decreed that the said plaintiff's attachment lien upon the said above described lot as it existed on the second day of October, 1914, at 10:50 o'clock in the morning thereof, or at any time thereafter, be and the same is hereby foreclosed; and it is further ordered that the said plaintiff may have its order of sale in terms of law directing the Marshal of the United States for the Northern District of Texas to seize and sell the said lot as provided by law for sales under execution, the proceeds thereof,

or so much thereof as may be necessary to be applied to the satisfaction of the judgment herein rendered in favor of the said plaintiff and against the said Mrs. Minnie Kahn Grosman; remainder, if any, to be paid to the said Mrs. Minnie Kahn Grosman, her heirs or assigns, and it is so ordered, adjudged and decreed.

It is further ordered, adjudged and decreed that execution
32 shall issue hereon in favor of the officers of Court against each party for the costs by him respectively incurred.

E. R. MEEK, *Judge.*

Filed and entered July 3rd, 1915.

Assignments of Error of Defendant, Minnie Kahn Grosman.

Filed July 28th, 1915.

Now comes the defendant, Minnie Kahn Grosman, joined herein pro forma by her husband, Hiram Grosman, and says that in the record and proceedings of the said Court in the above entitled and numbered cause, and in the final decree made and entered therein on July 3rd, 1915, there is manifest error, and for error the said defendant assigns the following:

1. The Court erred in not rendering a decree against the complainant and in favor of this defendant because the purported contract of guaranty, made the basis of this action as against this defendant, is not enforcible for that under and by virtue of the laws of the state of Texas, this defendant, being at all times a citizen of the state on Texas, and being on May 23, 1914, and at all times since said date a married woman, labored under the disability of coverture; and under the laws of the state of Texas was wholly incapacitated from entering into the purported contract of guaranty upon which the complainant has been decreed a recovery.

2. The purported contract of guaranty made the basis of this action as against this defendant is non-enforcible because thereby this defendant, a citizen of Texas, laboring under the disability at the time of the execution of the said purported contract of guaranty and ever since, not joined by her husband, undertook to be-
33 come a surety of the co-partnership of Hiram Grosman & Company, a co-partnership composed of Hiram Grosman and Mose Grosman, whereas the statute of the State of Texas in force at the time of the making of said purported contract of guaranty and ever since, provides that: "The wife shall never be * * * a surety on any bond or obligation of another without the joinder of her husband with her in making such contract"; and the Court erred in not so holding and in not rendering a decree against the complainant and in favor of this defendant.

3. The contract of guaranty made the basis of this action as against this defendant is non-enforcible because opposed to the settled public policy of the State of Texas for the protection of married women who are citizens of the State, and the Court erred in not so holding.

4. The undisputed evidence showed that no part of the $25,000.00, the payment of which this defendant, not joined by her husband, undertook to guarantee, inured to the benefit of this defendant either as necessaries for herself or for her children, or for the benefit of her separate property, or otherwise; and the undisputed evidence shows that the complainant at the time it accepted said puported contract of guaranty knew that this defendant was a married woman, and that she was then a citizen of Texas and the Court erred in enforcing the said purported contract of guaranty because the same was palpably opposed to the settled public policy of the State of Texas, in that the same was expressly prohibited by the laws of the State of Texas.

5. The limit of this defendant's liability, if any, would not under her purported contract of guaranty, exceed the sum of $25,000.00, from which sum should have been deducted the agreed credit of $8,238.00, leaving a balance of only $16,762.00, whereas the Court decreed this defendant to be liable to the complainant in the sum of $18,762.00, and in so decreeing it committed error.

34 6. The Court erred in decreeing in favor of complainant and against this defendant the sum of $2,000.00 as attorney's fees, because this defendant's liability in no event could exceed the sum of $25,000.00, and there was an agreed credit thereupon of $8,238.00, leaving a balance of only $16,762.00.

7. The Court erred in foreclosing the purported attachment lien upon the separate property of this defendant because the writ of attachment could not legally issue or be foreclosed in this action.

Wherefore, the said defendant, Minnie Kahn Grosman, prays that the said decree, in the respects hereinabove complained of be reversed.

F. M. ETHERIDGE,
J. M. McCORMICK,
H. L. BROMBERG,
Solicitors for the Defendant, Minnie Kahn Grosman.

Filed July 28th, 1915.

Petition for Appeal and Allowance Thereof.

Filed July 28th, 1915.

The defendant Minnie Kahn Grosman, joined herein pro forma by her husband, Hiram Grosman, conceiving herself aggrieved by the final decree made and entered in the above numbered and entitled cause on the 3rd day of July A. D. 1915, do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and they pray that this

appeal may be allowed, and that a transcript of the record
35 proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
HENRI LOUIE BROMBERG,
Solicitors for Minnie Kahn Grosman and Hiram Grosman pro forma, as the Husband of said Minnie Kahn Grosman.

Dated July 28th, 1915.

The foregoing claim of appeal is allowed on the date last before written.

E. R. MEEK,
Judge, United States District Court for the Northern District of Texas.

Filed July 28th, 1915.

Appeal Bond.

Approved and Filed July 28th, 1915.

Know all men by these presents, That we, Minnie Kahn Grosman, joined herein pro forma by her husband, Hiram Grosman, as principal, and the other subscribers hereto, as sureties, are held and firmly bound unto Union Trust Company in the full and just sum of three thousand ($3,000.00) dollars, to be paid to the said Union Trust Company, its certain attorneys, successors or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of July, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a District Court of the United States for the Northern District of Texas, in a suit depending in said
36 Court, between Union Trust Company, plaintiff, and Minnie Kahn Grosman, Hiram Grosman and Mose Grosman, defendants, a decree was rendered against the said Minnie Kahn Grosman, and the said Minnie Kahn Grosman having obtained an appeal and filed a copy thereof in the clerk's office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Union Trust Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit, to be held at New Orleans on the 27th day of August next.

Now, the condition of this obligation is such that if the said Minnie Kahn Grosman shall prosecute her appeal to effect and answer all damages and costs if she fail to make her plea good then

the above obligation to be void; else to remain in full force and virtue.

MINNIE KAHN GROSMAN, *Principal.*
HIRAM GROSMAN, *Pro Forma.*
AMERICAN INDEMNITY CO., *Surety,*
[SEAL.] By H. L. BROMBERG, &
Agt. & Att'y in Fact.
CRUGER A. SMITH, *Agent.*

Approved by—
E. R. MEEK,
U. S. District Judge.

Approved and filed July 28th, 1915.

Evidence to be Included in the Record.

Filed August 16th, 1915.

Evidence to be Included in the Record.

Be it remembered that on the trial of the above numbered and entitled cause the following testimony was offered and received in evidence by the respective parties, to-wit:

37 Complainant offered in evidence a note for the sum of $25,000.00, being the note sued on in this cause, executed at Chicago, Ill., and dated May 23, 1914, due four months after date, payable to the order of complainant, Union Trust Company, which pledges certain collateral security, being the same set forth in the petition, and which is signed by Hiram Grosman Company, by Hiram Grosman, and makes provision for interest and attorney's fees.

Complainant also offered in evidence a note for $3,404.00, dated Chicago, August 17, 1914, due September 23d after date, payable to the order of complainant, Union Trust Company, with interest after date, pledging certain collateral securities, also providing for attorney's fees, and signed by Hiram Grosman Company, by Hiram Grosman.

Complainant also offered in evidence an instrument dated Chicago, Ill., May 23, 1914, in words and figures, as follows:

CHICAGO, May 23rd, 1914.

For value received, at the time of the execution hereof, and in consideration of and to induce the Union Trust Company to continue or extend credit—guarantee unconditionally, and at all times during the continuance hereof, the full and prompt payment unto the Union Trust Company, of the principal and interest as the same becomes due, or as the same may become payable under any extension or renewal thereof made during the life hereof, of all loans,

discounts, credits and overdrafts which may heretofore have been made, or may hereafter be made or allowed (including all costs, attorney's fees and other outlays of the guaranteed in enforcing same, and in enforcing this guaranty) by said Union Trust Company against Hiram Grosman & Company to the full amount of all credits and not exceeding twenty-five thousand ($25,000.00) dollars, and agree that this guaranty shall be a continuing one and be and continue to be binding without any notice to the undersigned
38 of its acceptance, or of the making of an extension or renewal or demand for, or notice of non-payment at maturity, of any of such loans, discounts, credits or overdrafts, all such notice or demand and all other notice or demand being expressly waived; and further, that this guaranty shall remain and be in full force from time to time and apply on all loans, discounts, credits and overdrafts and all renewals and extensions thereof made prior to and until said Union Trust Company shall receive notice in writing by the undersigned of the discontinuance of this guaranty as to any further loans, discounts, credits or overdrafts and upon such notice being so received this guaranty shall not extend to any loans, discounts, credits or overdrafts thereafter made by said Union Trust Company, but shall remain in force until the full payment of any loans, discounts, credits and overdrafts then existing; and I further agree that the taking of other additional securities or evidence of indebtedness by said Union Trust Company upon any loan, discount, credit or overdraft, or the extension or renewal thereof, shall not impair or release this guaranty. If signed by more than one, this obligation shall be deemed to be joint and several and shall be valid and enforcible against the survivor of any two or more who sign this guaranty.

Witness my hand and seal the date above mentioned.

MINNIE KAHN GROSMAN.

This 23rd day of May, 1914, appeared before me Minnie Kahn Grosman, personally known to me to be the same person who signed, sealed and delivered the foregoing instrument for the purposes therein set forth.

[SEAL.] M. BELLE CARNAHAN,
Notary Public.

My commission expires March 23, 1916.

Indorsements: Guaranty. Account of Hiram Grosman & Company. $25,000.00 to Union Trust Company, Chicago, Illinois, May 23, 1914. Guarantors, Minnie Kahn Grosman.

39 To the introduction of this document the defendant, Mrs. Minnie Kahn Grosman, objected on the following grounds:

(1.) It appears that she is now a citizen of Texas;

(2.) That it does not appear either by allegation or proof that said defendant was ever either a resident in or a citizen of the State of Illinois;

(3.) Because the law of Illinois which in effect removes the disability of coverture of married women and authorizes married women in their own names to contract and incur liability and sue and be sued, has no extraterritorial effect; that the validity of such law of the State of Illinois as attempted to be enforced in this jurisdiction is dependent solely for its efficacy upon the question of State Comity, and that whilst ordinarily State Comity will be extended, yet it will not and should not be in this instance, for the reason that the law of the State of Illinois is contrary to the expressed public policy of the State of Texas, as evidenced both by the statutes thereof and by the decisions of the Courts of Texas, and because there is neither allegation nor proof that the twenty-five thousand ($25,000.00) dollars to secure which the purported guaranty was given, was for necessaries of the defendant Minnie Kahn Grosman or for necessaries for her children, and because there is neither allegation nor proof that the twenty-five thousand ($25,000.00) dollars or any portion thereof, to secure which the purported guaranty was given, was for the benefit of the separate property of the said defendant Minnie Kahn Grosman, and because the purported guaranty bears only the individual signature of the defendant Minnie Kahn Grosman, and does not purport to be executed by her husband, Hiram Grosman, and because it does not bear or purport to bear the genuine signatures of the defendant Minnie Kahn Grosman and her husband Hiram Grosman, and because there is neither allegation nor proof that the disability of coverture of the defendant Minnie Kahn Grosman has been in any wise removed by any judgment of any Court of competent jurisdiction within the State of Texas, the domicile of said Minnie Kahn Grosman.

(4.) That this purported guaranty, while purporting to have been acknowledged by Minnie Kahn Grosman, does not show that she was examined privily and apart from her husband, and in accordance with the laws of the State of Texas in that respect.

The objections were taken under advisement by the Court until the final argument of the case, when they were then overruled; and to the action of the Court in overruling the same the defendant Minnie Kahn Grosman then and in open Court excepted.

The complainant then offered in evidence an agreement between the parties in words and figures as follows:

"The defendant Hiram Grosman applied to plaintiff for a loan of $25,000. At that time both he and Mrs. Minnie Kahn Grosman were in Chicago, together. Plaintiff informed Hiram Grosman that such loan could only be made upon Mrs. Grosman's guaranty and on Saturday, the 23rd day of May, 1914, defendant presented the written guaranty declared upon by the plaintiff, signed by Mrs. Minnie Kahn Grosman. That both defendant Hiram Grosman and Mrs. Minnie Kahn Grosman were then and at that time in Chicago and executed and delivered the instruments declared upon respectively for the purpose of making valid, binding and good faith obligations, and for the purpose of securing from this plaintiff the $25,000.00 sued for herein."

Complainant offered in evidence the writ of attachment showing the levy upon Lot 1 and the east (½) half of lot 2, in Block 78-123, according to the official map of the City of Dallas, being 75 by 100 feet at the southwest corner of Ray and Commerce streets in the City of Dallas, being the same property conveyed by the Oriental Investment Company to Mrs. Minnie Kahn Grosman, dated
41 December 26, 1912, as shown by the Deed Records of Dallas County, Texas, also upon a part of Block 1130-3, according to the official map of the City of Dallas on Ervay street, the levy being made on the 2d day of November, 1914.

To the introduction of the writ of attachment, and the marshal's return thereon, the defendant Minnie Kahn Grosman, then interposed the following objections:

(1.) This is an equity suit and a writ of attachment will not lie in an equity cause, a writ of attachment will lie only in common law causes.

(2.) This writ of attachment was issued in the sum of $28,000.00 as against the defendant Minnie Kahn Grosman upon her alleged guaranty of date May 23, 1914, in the sum of only $25,000.00. It is manifest that the amount for which the attachment has been sued out is in excess of any possible liability of the defendant Mrs. Minnie Kahn Grosman, even in event she incurred any liability whatsoever by reason of signing this purported guaranty.

(3.) We object to it on the further ground that the bill of complaint, which is made the basis for the issuance of this attachment, alleges that the complainant at the time the attachment was sued out held a valid security upon certain personal property in the bill described, and that therefore in no event was this attachment in the sum of $28,000.00 lawful or permissible, because under the statute of the State of Texas, as one of the essential pre-requisites for suing out an attachment, it devolves upon the party applying therefor to swear, or some one on his behalf, to swear that the complainant will probably lose his debt unless the attachment is issued. Our position is that there is an essential variance—a material variance.

When the objections were made counsel for the complainant and for the defendants, in open Court, agreed that the value of the personal property upon which foreclosure was sought in the bill was thirty cents on the dollar of its face value of $32,500.00,
42 or of an actual value of $9,750.00. Whereupon the defendant Minnie Kahn Grosman interposed the further objection to the said writ of attachment, and the return thereon, that in view of the admitted value of the securities the attachment writ issued for an amount in excess of that part of complainant's indebtedness, which under any theory of the law of the case would be due by the defendant Minnie Kahn Grosman. All of which objections were taken under advisement by the Court, the evidence admitted, and upon the argument of the case were overruled by the Court, to which action of the Court the said defendant Minnie Kahn Grosman then and there, in open Court, excepted.

The defendant Minnie Kahn Grosman, through her counsel, stated in open Court, that the defense of homestead interposed by her was by her waived.

Complainant then introduced its witness HARRY A. WHEELER who testified as follows:

I reside in Chicago; am in the banking business, with Union Trust Company, the plaintiff in this suit, of which I am vice president. I held this position in 1914. As such officer I negotiated with Mr. Grosman with reference to the notes and matters involved in this suit. The $25,000.00 note is in my handwriting. It was presented by me to Mr. Grosman and signed by him at my desk. Prior to that time I had had a conversation with him regarding a guaranty. I did not make the loan on the note alone. Before I made the loan the guaranty which has been introduced in evidence signed by Mrs. Minnie Kahn Grosman was presented to me. This guaranty was presented at the same time and with the $25,000.00 note which has been introduced in evidence, and bears date May 23, 1914. The Guaranty and the note for $25,000.00 were presented to me in the City of Chicago, State of Illinois, on May 23, 1914, by Mr. Grosman in person.

43 Complainant then introduced its witness HIRAM GROSMAN, who testified as follows:

I am one of the defendants in this suit. Minnie Kahn Grosman is my wife. I presented this $25,000.00 note and guaranty to Mr. Wheeler, an official of the Union Trust Company. At that time Mrs. Grosman was in Chicago. She signed the guaranty which has been introduced in evidence in Chicago. I told her what I was going to do with it and asked her to sign it for the purpose of securing this loan of $25,000.00. I do not recall making any representations to Mr. Wheeler as to what property Mrs. Grosman had. I think I did so but I am unable to recall what pieces of property I mentioned.

On cross-examination this witness testified:

Mrs. Grosman and I were not living or residing in Chicago at the time she signed the obligation in evidence. We were merely there on a visit at that time. Mrs. Grosman was born and raised in exas. She was born at Marshall and has never resided elsewhere than in Texas. Her disabilities have never been removed by judgment or in any other way in Texas. No part of the $25,000.00 procured from the complainant was obtained or used for the benefit of her separate estate; nor was any part of the said $25,000.00 obtained or used for necessaries for Mrs. Grosman or her children.

On redirect examination this witness testified:

The visit of myself and Mrs. Grosman to Chicago was for purposes other than securing the loan from plaintiff. We were in Chicago, but the securing of this loan was not the primary purpose of our being there. I presume we had been there ten days or two

weeks before I approached Mr. Wheeler to secure this loan. About a week before I approached Mr. Wheeler about the matter I had negotiations with the Union Trust Company about the loan. At the time of these first negotiations Mr. Wheeler had left the
44 city and I waited until his return. I waited in Chicago, Illinois, until he came back. When he first came back he was not able to give me an answer until he investigated the securities for it. He was to take up with somebody in Dallas and investigate the securities I offered. After he had made this investigation he found the matter satisfactory, but he preferred a guaranty from Mrs. Grosman, and I secured this guaranty and returned with it and my note. Mr. Wheeler did not say that he would not make the loan without the guaranty but he asked me for it and I gave it to him. He did not make the loan until after he got the guaranty. I knew what I was giving when I gave the guaranty, and I thought the security I was giving would justify my giving the guaranty of Mrs. Grosman, by which I mean, at the time this security was given, the property on which it was given was merged with other property, so that I thought the security aside from this guaranty of Mrs. Grosman was sufficient security for the note. Mr. Wheeler did not think so. He exacted a guaranty and I got it and gave it to him. Mr. Wheeler knew that I lived in Texas, and I presume he also knew that Mrs. Grosman lived in Texas.

Complainant then offered in evidence an agreement that the sum of $2,000.00 is a reasonable attorney's fee to be paid complainant's attorney for the institution and prosecution of the suit, to which testimony the defendant Minnie Kahn Grosman then objected on the following grounds:

(1.) That the guaranty does not authorize or cover attorney's fees.

(2.) That the purported obligation of guaranty limits the obligation of the defendant Mrs. Minnie Kahn Grosman to the sum of $25,000.00, and purports to be a present and continuing guaranty, the measure of which at any one time is $25,000.00. The amount of the liability of Mrs. Grosman, provided it is a binding ob-
45 ligation, is $25,000.00. A deduction from that sum of the agreed value of the security—$9,750.00—leaves a residue of $15,250.00, which is the largest amount the Court can in any event foreclose the attachment lien for as against Mrs. Grosman, and the other defendants have no interest in the property attached.

(3.) To allow the $2,000.00 attorney's fees, as against the defendant Minnie Kahn Grosman, would increase her liability, if it exists at all, from $15,250.00 plus interest, to $17,250.00 plus interest.

And the said defendant Minnie Kahn Grosman also interposed the same objections that she had urged to the introduction of the guaranty when offered in evidence.

All these objections were by the Court overruled to which action of the Court the said defendant Minnie Kahn Grosman then and there in open Court excepted.

We, the undersigned, attorneys for the defendant Minnie Kahn Grosman, present the foregoing statement for the approval of the Judge.

ETHERIDGE, McCORMICK & BROMBERG,
Attorneys for the Defendant, Minnie Kahn Grosman, Joined by Her Husband, Hiram Grosman, Pro Forma.

Agreed to as correct:
WM. H. ATWELL,
Attorney for Complainant, Union Trust Company.

Approved:
EDWARD R. MEEK,
U. S. District Judge, Northern District of Texas.

Filed August 16th, 1915.

46 *Præcipe for Transcript.*

Filed August 17th, 1915.

To L. C. Maynard, Clerk of said Court:

SIR: You are hereby requested to include in the transcript of the record on appeal in the above styled cause, the following matters, to-wit:

1. Affidavit for writ of attachment.
2. Bond for attachment.
3. Writ of attachment and marshal's return thereon.
4. Plaintiff's original complaint.
5. Motion of Minnie Kahn Grosman to dismiss bill of complaint as to her.
6. Order denying last named motion.
7. Answer of defendant Minnie Kahn Grosman.
8. Joint and several answer of Hiram and Mose Grosman.
9. Plaintiff's first supplemental petition.
10. Plaintiff's replication to answer of defendant Minnie Kahn Grosman.
11. Plaintiff's amendment to Section 6 of its replication.
12. Amendment to answer of defendant, Minnie Kahn Grosman.
13. Final decree.
14. Petition for appeal and allowance.
15. Appeal bond.

47 16. Assignments of error.
17. Agreed statement of evidence.

Respectfully,

FRANCIS MARION ETHERIDGE,
JOSEPH MARION McCORMICK,
HENRI LOUIE BROMBERG,
Solicitors for Minnie Kahn Grosman.

I acknowledge service upon me this 16th day of August, 1915, of a copy of the foregoing præcipe and agree that the documents mentioned therein are those which should constitute the transcript.

WM. H. ATWELL,
Solicitor for Union Trust Company, Appellee.

Filed August 17th, 1915.

Clerk's Certificate.

I, Louis C. Maynard, Clerk of the District Court of the United States for the Northern District of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, assignments of error and of all proceedings had in Cause No. 2778 in Equity, wherein the Union Trust Company is plaintiff and Hiram Grosman et al. are defendants, except that the original citation in error is included therein instead of a copy thereof, as fully as the same remain on file and of record in my office at Dallas, Texas.

Witness my hand officially and the seal of said District Court at Dallas, Texas, this the 24th day of August, A. D. 1915.

[SEAL.] LOUIS C. MAYNARD, *Clerk,*
By E. C. VAN DUSEN, *Deputy.*

48 That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of November 15th, 1915.

No. 2831.

MINNIE KAHN GROSMAN et als.

versus

UNION TRUST COMPANY.

On this day this cause was called, and, after argument by Francis Marion Etheridge, Esq., for appellants, and William H. Atwell, Esq., for appellee, was submitted to the Court.

49 *Opinion of the Court.*

Filed January 4th, 1916.

In the United States Circuit Court of Appeals, Fifth Circuit.

Number 2831.

MINNIE KAHN GROSMAN et al., Appellants,

vs.

UNION TRUST COMPANY, Appellee.

Appeal from the District Court of the United States for the Northern District of Texas.

Francis Marion Etheridge, Joseph Manson McCormick, and Henri Louie Bromberg, for appellants.
William H. Atwell, for appellee.

Before Pardee and Walker, Circuit Judges, and Speer, District Judge.

WALKER, *Circuit Judge:*

On May 23, 1914, the appellant, Mrs. Minnie Kahn Grosman, who has been a resident of Texas since her birth, while on a visit to Chicago, accompanied by her husband, Hiram Grosman, also a resident citizen of Texas, executed a guaranty or suretyship contract, signed by her alone, by the terms of which she made herself a surety for a debt of her husband's firm, Hiram Grosman & Company, evidenced by its note, signed in the firm name by her husband. Some months after Mrs. Grosman's return to her home in Texas, and after the maturity of the obligation of Hiram Grosman & Company which was referred to in the suretyship contract, this suit was brought against her, against her husband's firm, and against the indi-
50 viduals composing it. The objects of the suit were a recovery against the defendants other than Mrs. Grosman on the obligation for which she signed as surety or guarantor and also on other obligations, the foreclosure of an asserted lien on personal property by which those obligations were secured, and a recovery against Mrs. Grosman on her contract above mentioned. At the time of the institution of the suit a writ of attachment was issued, which was levied on real estate in the city of Dallas which belonged to Mrs. Grosman and was her separate property. Mrs. Grosman duly pleaded her coverture and raised the question of the right of the plaintiff to have enforced by the court in which the suit was brought the liability which was asserted against her. By the decree appealed from the court adjudged in favor of the plaintiff and against Mrs. Grosman the amount called for by her guaranty or suretyship contract less a credit allowed on account of the application upon the

demand of the plaintiff of the proceeds of the sale of personal property upon which a lien in its favor was decreed, and for the amount decreed against Mrs. Grosman ordered the foreclosure of the lien of the writ of attachment levied on her separate property and the sale of that property.

Evidence was adduced to the effect that under the law of Illinois, the state in which Mrs. Grosman signed the instrument sought to be enforced against her, her act had the effect of creating a valid and enforceable contract. It is contended in behalf of Mrs. Grosman that, notwithstanding the validity of the contract where it was made, the decree appealed from was unwarranted because the effect of it was to contravene a public policy of Texas, established by express legislative enactment. The doctrine which this contention invokes is a well-settled one. A statement and application of it are found in the opinion in the case of The Kensington, 183 U. S. 263. That case involved the question of the enforceability in the courts of the United States of a provision of a contract of a carrier made
51 in Belgium, the provision being valid there, and the contract expressly providing that "all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made." It was insisted that the law of Belgium should be applied, though the provision in question contravened a public policy applied by the courts of the United States. With reference to this position the court said:

"The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the lex loci governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught." The Kensington, supra, page 269.

The result was that the court, concluding that the provision in question was one which contravened a rule of public policy applied in the forum in which the provision came into question, decided that it was not there enforceable. In a much earlier case in the same court the ruling was to the effect that the enforcement of a contract, no matter where made or where to be executed, if that contract is in violation of the law or contravenes the public policy of the government in a forum of which its enforcement is sought, cannot be compelled in that forum. Kennett, et al. v. Chambers, 14 How. 38, 52. For other statements and applications of the same rule, see Emery v. Burbank, 163 Mass. 326; 5 Ruling Case Law, 944, and notes. In an action to enforce any kind of liability the law of the forum is material in so far as it sets a limit of policy beyond which such obligations as the one asserted will not be enforced there. Cuba R. R. Co.

v. Crosby, 222 U. S. 473, 478. We do not understand that there is a controversy in this case as to the proposition that a court
52 charged with the administration of the laws of Texas is not required to enforce a contract made in another jurisdiction and valid there when to do so involves a disregard of an established public policy of Texas. But it is contended by the counsel for the appellee that the statute law of Texas, which is invoked by the counsel for the appellant, does not evidence the existence of a public policy of that state which would be contravened by the enforcement of the contract in question by a court which administers the laws of that state.

This brings us to a consideration of the statute laws of Texas, to which our attention is directed. Before the taking effect of an act of the Legislature of Texas which was approved March 21, 1913, Article 4621 of the Revised Statutes of Texas of 1911 defined the separate property of the husband and of the wife, Article 4622 defined the community property of the husband and wife, and Article 4624 specified what contracts could be made by the wife. Under the law as it existed while the three articles mentioned were in force a married woman could only bind herself by a contract entered into for necessaries of herself or children or for the benefit of her separate estate. Cruger v. McCracken, 87 Texas 584; Noel v. Clark, 60 S. W. 356; Shorter v. Brackenridge, 102 Texas 386. In immediate connection with the provisions above mentioned is found the following, being Article 4625 of the same compilation:

"Judgment and execution in such cases.—Upon the trial of any suit as provided for in the preceding article, if it shall appear to the satisfaction of the court and jury that the debts so contracted or expenses so incurred were for the purposes enumerated in said article, and also that the debts so contracted or expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife, at the discretion of the plaintiff."

The Act of March 21, 1913, amended Articles 4621, 4622 and 4624. It did not mention Article 4625. That article remains in force to some extent at least, unless it has been deprived of all operative effect as a result of the incompatibility of any of its provisions
53 with those of the later enactment of March 21, 1913. Article 4621, as it was amended by that act, defines the separate properties of the husband and of the wife, provides, subject to qualifications in the case of the wife, for each having the sole management, disposition and control of his or her separate property, specifies how named separate property of the wife may be conveyed or transferred, and contains the provision that "neither the separate property of the wife, nor the rents from the wife's real estate, nor the interest on bonds and notes belonging to her, nor her personal earnings shall be subject to the payment of debts contracted by the husband." Article 4622, as amended, specifies what shall be deemed the common property of the husband and wife—commonly called the community property—and designates the part of it which shall be under the control, management and disposition of the wife alone, "subject to

the provisions of Article 4621, as hereinabove written." Article 4624, as amended, reads as follows:

"Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property shall be subject to the payment of debts contracted by the wife, except those contracted for necessaries furnished her or her children; provided, the wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract."

Whatever enlargement of a married woman's right to bind herself by contract can be regarded as having been effected by the act above referred to is subject to the qualification or exception stated in the proviso found in amended Article 4624, which has just been quoted. So far as that proviso affects the right of a married woman to become a surety, its explicit prohibition is that "the wife shall never be * * * a surety on any bond or obligation of another without the joinder of her husband with her in making such contract." We think the language of this provision forbids a married woman becoming surety for another unless her husband joins her in
54 the suretyship contract. The word "another", used as it is in that proviso in describing any bond or obligation of any one besides the wife, cannot reasonably be given such a meaning as would prevent the husband being regarded as another than his wife within the purpose of the proviso. Giving to the proviso the meaning its words express, for the bond or obligation of another to be one as to which a married woman may become a surety it must be one with reference to which her husband may join her in a contract of suretyship. This excludes a bond or obligation upon which the husband is a principal, as he cannot be his own surety. The result is that the wife is forbidden to become a surety when, from the nature of the case, her husband cannot join her as a co-surety. At any rate, the husband, in becoming a principal on a bond or obligation, cannot well be regarded as joining his wife in the separate contract by which she undertakes to bind herself as a surety. The two obligations are separate and distinct in their natures and consequences, though one of them is collateral to the other. Whatever doubts as to the correctness of these conclusions might exist if the proviso in question stood by itself, we think are removed when it is considered in connection with the above-quoted provision of Article 4621 as amended. The embodying of the two provisions in the same statute we think clearly manifests a legislative purpose to forbid a married woman becoming a surety for an obligation on which her husband is a principal. It cannot be supposed that it was in the legislative contemplation that the quoted provision of amended Article 4621 prohibiting the subjecting to the payment of debts contracted by the husband of the wife's separate property and specified parts of the community property was to be effective only in the case of the wife failing to become a surety for her husband's debts. If it was so supposed, the will of the legislature would not control unless it hap-

pened to coincide with that of the wife. The conclusion is
55 that a contract made by the wife alone by which she undertakes to become a surety on a bond or obligation on which her husband is a principal is one which a married woman is forbidden by the statute law of Texas to make, and the enforcement of which against her separate property or against specified parts of the common property of herself and husband is prohibited by the same law.

When the Act of March 21, 1913, is considered in connection with the previously existing statute law which it amended we think it clearly discloses a legislative purpose to enlarge the capacity of the married women of Texas to bind themselves by contract and to extend their powers over property, both their separate property and specified parts of the community property; but we think also that with equal clearness it manifests a purpose to provide, for the protection of the property interests of Texas married women, safe-guards which are put beyond their power to remove or dispense with. The act evidences the establishment, or rather the continuance with modifications it makes, of a well-defined public policy of preventing the diminution of the estates of the married women of Texas by unauthorized transfers or conveyances or by subjecting them to the payment of forbidden obligations. A notable feature of that policy is disclosed by the prohibition found in the provision of Article 4621, as it was amended, that "neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings shall be subject to the payment of debts contracted by the husband." An effect of this provision is to forbid courts which administer the laws of Texas to afford a remedy for the enforcement against the mentioned property interests of the wife of debts contracted by the husband. The denial of such remedy is general in its terms. It is not confined to Texas contracts of the kind mentioned, but is broad enough in its terms to
apply to such contracts wherever made, though they may be
56 valid and enforceable where they were made. It well may happen that an attempt to enforce an obligation, recognized as valid where it was entered into, will fail where the remedy sought is one which is forbidden by the law of the forum. Pritchard v. Norton, 106 U. S. 124; and see notes to American National Bank v. Chapman, 57 L. R. A. 513, 522; and to International Harvester Co. v. McAdam, 26 L. R. A. (N. S.), 774. Certainly it would be overtaxing the comity which reasonably may be expected to influence the forum resorted to to call for the enforcement by it of such a remedy when the obvious purpose of the law of the forum in forbidding the remedy is to prevent the setting at naught of a public policy established by the same law.

The conclusions are that it is a part of the public policy of Texas, established by statute, to prevent the separate property of its married women being subjected to the payment of such a demand as the one asserted against Mrs. Grosman in this case, and that the decree appealed from is erroneous in that it subjected her separate property

to the payment of that demand. It follows that the decree against Mrs. Grosman should be reversed; and it is so ordered.

Judgment.

Extract from the Minutes of January 4, 1916.

No. 2831.

MINNIE KAHN GROSMAN et al.

versus

UNION TRUST COMPANY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged
57 and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed;

It is further ordered, adjudged and decreed that the appellee, Union Trust Company, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

58 *Petition for Rehearing.*

Filed January 17th, 1916.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 2831.

MINNIE KAHN GROSMAN et al., Appellants,

vs.

UNION TRUST COMPANY, Appellee.

Appeal from the District Court of the United States for the Northern District of Texas.

May it Please the Court:

Comes now the appellee in the above styled and numbered cause and presents this its motion for a rehearing and prays that the judgment of reversal herein entered on the 4th of January, 1916, be in all things set aside, and that the judgment of the lower court be affirmed, for the following reasons, to-wit:

First. Because the court erred in holding that The Kensington,

183 U. S. 263, rules this case, since the opinion in that
59 case shows that in all of the courts of the United States, as well as in many of the courts of the States of the United States, it has always been the policy to refuse to allow a common carrier to limit its liability for the negligence of its servants and that the Congress of the United States in 1893 further recognized this unbroken line of decisions by the passing of the Harter Act.

There was, therefore, a well defined public policy in the United States against the limiting of such liability, and the courts themselves announced that they would not allow the limiting of such liability because "it was against public policy."

In the instant case a Texas married woman was originally under all of the disabilities fixed by the common law, but from time to time she has been given more liberty and this liberty has been given both by the Legislature of the State of Texas and by the courts of the State of Texas until finally there came the Act of 1913, which gave her more rights than she had ever had, and the decision of one of the Texas appellate courts, in the case of Merreilles v. State Bank, 5 Tex. Civ. App. 483.

Second. The Kensington case differs from the case at bar and should not rule it, for the reason that the refusal of the courts of the nation of the United States to accept the construction of the courts of a foreign nation of a contract in question, because
60 such contract and construction are clearly against legislatively announced public policy and judicially announced public policy, without a single exception, is not parallel to the question presented when a domestic contract, valid in one of our home States, is presented for enforcement in another one of the forty-eight home States, especially when such latter home State has, through its own courts and through its law making bodies, expressed clearly that there is no well defined and settled public policy against the enforcement or validity of such contract.

Third. The Kensington case should not rule the case at bar because the Supreme Court, in the Kensington case, clearly indicated by the use of words, relating to the exact point at issue that the Belgium law and the Belgium contract, would not be enforced in the United States Courts for the reason that such courts had repeatedly and unbrokenly held that such limiting conditions in contracts were in conflict with public policy, the identical language being as follows:

"It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago and has been so frequently reiterated, that it is elementary."

"Public policy" as thus used and as understood by the
61 courts of the present day, does not rest exclusively upon the ipso dixit or pronunciamento of a judicial opinion, but goes deeper and finds its life in an immorality or viciousness or con-

scienceless wrong. International Harvester Co. v. McAdams, 124 Wis. 114; 124 N. W. 1042. A contract, therefore, printed upon a bill of lading or upon a ticket, or a transportation license, oft-imes in small and insignificant letters and phrases, never read, never called to the attention of the purchaser or traveler, but relied upon to relieve the carrier from its own negligence in the destruction of the passenger's property, is unthinkable to the American jurist, and shocks, and ought to shock, and always has shocked, his ideas of equity. For at least one very small reason, without naming others, namely, that the passenger and the carrier had never come together upon any express contract for such limiting, and the passenger knew nothing about it, and the acceptance of his ticket or transportation cardboard would not be permitted by the American courts to deprive him of his property.

There is no such immorality or viciousness about the enforcement of the Texas married woman's contract in question. The facts show that she and her consort were in the State of Illinois where she, under its statutes, was a feme sole. That being thoroughly advised of the contract she was about to sign and did sign, it was presented by her husband to her, and after her signature, re-
62 turned to the appellee, who, in good faith, turned over $25,000.00 in cash.

A recital of the facts, merely, shows the vast difference between the two cases, and makes it utterly impossible to find any viciousness or any immorality or any wrong that could be worked against the Texas married woman by the enforcement of the contract in question.

Therefore the action of the Texas appellate courts in the Merreilles case, and the action of the Texas Legislature from time to time broadening the rights and liberties of the Texas married women, even though it be, that the Texas courts have met such emancipation with a well-defined marking of its boundaries, show, not only, that there is no viciousness or immorality or wrong in the maintenance of the validity of the contract in question, but also show that there is no settled public policy in Texas. In other words, that the trend is toward emancipation, and the 1913 Legislature in answer to this resistless current for emancipation, announced, in the preamble to the Act, that it was for the purpose of enlarging the rights of the married women, the exact words being as follows:

"An Act to amend Articles 4621, 4622 and 4624 * * * concerning the marital rights of parties, defining separate and community property of the husband and wife, conferring upon the wife the power to make contracts authorizing suits on such contracts, giving the wife control over her separate property * * * *."

63 And in the emergency clause the following language is used:

"The fact that the present law denies to married women the right to manage their separate property and to make contracts, is unjust to a large number of citizens of this State, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended," etc.

Fourth. Said judgment is erroneous because, while there may be

a different minority holding among the various courts of the United States, the rule is that a contract valid where executed is valid everywhere.

Fifth. Such judgment is erroneous and the following of the same would work endless confusion in the commercial transactions among the various citizens of the different States of the United States.

Sixth. A rehearing should be granted for the reason that such judgment is in direct conflict with the United States Circuit Court of Appeals for the Second Circuit in the case of First National Bank of Chicago v. Mitchell, 92 Fed. 565.

Seventh. A rehearing should be granted because the trend of commerce, of legislation and of judicial decision is toward the recognition of the United States as one nation, and not as an aggregate of forty-eight different sovereignties.

Eighth. A new hearing should be granted for the reason
64 that the case of Cuba R. R. Co. v. Crosby, 222 U. S. 473, is not a ruling authority, for the judgment announced by this Honorable Court, in that the said case speaks solely with reference to contracts made abroad, that is, contracts made beyond the jurisdiction of the United States, and declares that our courts will not extend hospitality to such foreign contracts if they be made the cover for injustice.

Of course, as heretofore observed, the immorality and injustice and the unrighteousness, if any there be in this case, all lie on the side of the breaking of the contract. Such attributes do not come into being and are unnoticeable when the contract is held to be valid and enforceable. In other words, there is no "public policy" of the sort recognized by the Supreme Court in the instant case.

Ninth. A rehearing should be granted for the reason that the opinion of this Honorable Court holding that under the laws of the State of Texas a married woman could not become a surety on any bond or obligation of another without the joinder of her husband, which is unquestionably the Texas law, would prevent the making by her of a valid contract in a State where she was not under such a disability, is erroneous, since a contract valid where made is valid everywhere, unless there be a well-defined public policy, public policy meaning, as heretofore indicated, against such validity or enforcement.

65 Wherefore, it is respectfully prayed that a rehearing be granted, that justice may be done.

WILLIAM H. ATWELL,
Attorney for Appellee, Union Trust Company.

I, William H. Atwell, a practitioner before this Honorable Court, hereby certify that I have examined the foregoing application for rehearing; that the same is not made for the purpose of delay and in my opinion said petition is meritorious, and well founded in law, and ought to be granted.

WILLIAM H. ATWELL,
Attorney for Petitioner, Appellee, Union Trust Co.

Order Denying Rehearing.

No. 2831.

Extract from the Minutes of February 1st, 1916.

MINNIE KAHN GROSMAN et al.

versus

UNION TRUST COMPANY.

Ordered that the petition for rehearing filed in this cause
66 be, and the same is hereby, denied.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 48 to 66 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2831, wherein Minnie Kahn Grosman, et al., are appellants, and United Trust Company is appellee, as full, true and
67 complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 47 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 2nd day of February, A. D. 1916.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

68 In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2831.

MINNIE KAHN GROSMAN et al., Appellants,

versus

UNION TRUST COMPANY, Appellee.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that, on the 13th day of March, A. D. 1916, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:—

"In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2831.

MINNIE KAHN GROSMAN et al.

v.

UNION TRUST COMPANY.

It is hereby stipulated by and between Messrs. Etheridge, McCormick & Bromberg, attorneys for the appellants, and William H. Atwell, attorney for the appellee, in the above-styled cause, that, inasmuch as the Supreme Court of the United States has
69 granted a writ of certiorari in the above cause, styled therein number 25,145, Union Trust Company, Petitioner, v. Minnie Kahn Grosman et al., Respondents, and whereas a certified transcript of the record in said cause has heretofore been forwarded to said court by the Clerk of this Honorable Court, that a certified copy of this stipulation forwarded by the Clerk of the United States Circuit Court of Appeals for the fifth Circuit, to the Clerk of the Supreme Court of the United States, shall be sufficient return to the writ of certiorari granted by the Supreme Court of the United States, and the record already on file therein may be used for deciding purposes by said Court.

Witness our hands at Dallas, Texas, on this the 11th day of March, 1916.

(Signed) ETHERIDGE, McCORMICK & BROMBERG,
Attorneys for Minnie Kahn Grosman et al.

(Signed) WM. H. ATWELL,
Attorney for Union Trust Company."

I further certify that the above is a true and correct copy of said stipulation, and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 13th day of March, A. D. 1916.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Minnie Kahn Grosman et al. are appellants, and Union Trust Company is appellee, No. 2831, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
71 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and procedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighth day of March, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

72 [Endorsed:] File No. 25,145. Supreme Court of the United States, October Term, 1915. No. 862. Union Trust Company vs. Minnie Kahn Grosman et al. Writ of Certiorari. In the United States Circuit Court of Appeals, Fifth Circuit. Filed 13th day of March 1916. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

73 [Endorsed:] 862/25145. No. 2831. United States Circuit Court of Appeals for the Fifth Circuit. Minnie Kahn Grosman et al., Appellants, vs. Union Trust Company, Appellee. Writ of Certiorari and Return thereto.

74 [Endorsed:] File No. 25,145. Supreme Court U. S., October term, 1915. Term No. 862. Union Trust Company, Petitioner, vs. Minnie Kahn Grosman et al. Writ of certiorari and return. Filed March 15, 1916.

FILED
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JAMES D. MAHER
CLERK

No. 387.
(25,145) 106

In the Supreme Court
Of The
United States

UNION TRUST COMPANY,
Petitioner,

v.

MINNIE KAHN GROSMAN, et al.,
Defendants.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

WILLIAM HAWLEY ATWELL,
Solicitor for Petitioner, Union Trust Company.

W. M. Warlick, Dallas, Texas. Law Printing. Phone M. 4091

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The contract of guaranty made by Mrs. Grosman while she was in the State of Illinois, to be performed in that State, is a valid contract, and must be construed and enforced according to the laws of that State.

Proposition — Second 15

The Illinois statute authorized a married woman to contract as a feme sole, and Mrs. Grosman's contract was valid there, and being valid there, will be enforced in a Texas forum.

Proposition — Third 15

It is the policy of Texas to extend comity.

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There is no exception to general proposition that a contract valid where executed and where to be performed, is valid and enforceable in any other nation, even as to nations separated by the seas, save that a contract would not be enforced in the latter nations if there were a well-defined and settled public policy against such a contract. "Public policy" as here understood, and as preventing such enforcement, means that the contract to be refused life must be vicious, or unjust, or immoral.

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No. 387.
(25,145)

In the Supreme Court
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UNION TRUST COMPANY,

Petitioner,

v.

MINNIE KAHN GROSMAN, et al.,

Defendants.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

(The figures in parentheses indicate pages in the Transcript of Record and to prevent repetition the word "Record" is not used at all.)

STATEMENT OF NATURE AND RESULT OF SUIT.

Petitioner is a banking institution in the city of Chicago. Sometime prior to May 23, 1914, Hiram Grosman and wife, Minnie Kahn Grosman, were in Chicago, and after having been there some time, came to petitioner's place of business and sought a $25,000.00 loan (30-31). The negotiations therefor covered a week or more (31). Mr. and Mrs. Grosman had been in Chicago ten days, or two weeks, before they approached petitioner to secure the loan (31). Grosman presented to the bank in Chicago the written guaranty, shown in the record, executed by Minnie Kahn Grosman in Chicago and before an Illinois notary public (30-31).

The guaranty was signed, executed and delivered in the State of Illinois while both Grosman and his wife were in that State (30-31).

On May 23, 1914, Grosman presented the said guaranty and the note for $25,000.00 to the petitioner in Chicago as aforesaid, and received $25,000.00 (30). The note was payable in Chicago. Grosman and his wife were together in Chicago, and Grosman secured the guaranty from his wife and turned it over to petitioner as aforesaid (30-31).

Thereafter a further loan, amounting to $3,404.00, was secured from petitioner (26). The $25,000.00 note was dated May 23, 1914, and was due four months after date (26). The written guaranty secured by Grosman, and signed and acknowledged by his wife, Minnie Kahn Grosman, was dated May 23, 1914, and was delivered to petitioner by Hiram Grosman, the husband, at the same time that the $25,000.00 note was delivered (30), such guaranty being in the following words:

"Chicago, May 23, 1914.

"For value received, at the time of the execution hereof, and in consideration of and to induce the Union Trust Company to continue or extend credit—guarantee unconditionally, and at all times during the continuance hereof, the full and prompt payment unto the Union Trust Company, of the principal and interest as the same becomes due, or as the same may become payable under any extension or renewal thereof, made during the life hereof, of all loans, discounts, credits and overdrafts which may heretofore have been made, or may hereafter be made or allowed (including all costs, attorney's fees and other outlays of the guaranteed in enforcing same, and in enforcing this guaranty) by said Union Trust Company against Hiram Grosman & Company to the full amount of all credits and not exceeding twenty-five thousand ($25,000.00) dollars, and agree that this guaranty shall be a con-

tinuing one and be and continue to be binding, without any notice to the undersigned of its acceptance, or of the making of an extension or renewal or demand for, or notice of non-payment at maturity, of any of such loans, discounts, credits or overdrafts, all such notice or demand and all other notice or demand being expressly waived; and further, that this guaranty shall remain and be in full force from time to time and apply on all loans, discounts, credits and overdrafts and all renewals and extensions thereof made prior to and until said Union Trust Company shall receive notice in writing by the undersigned of the discontinuance of this guaranty as to any further loans, discounts, credits or overdrafts, and upon such notice being so received, this guaranty shall not extend to any loans, discounts, credits or overdrafts thereafter made by said Union Trust Company, but shall remain in force until full payment of any loans, discounts, credits and overdrafts then existing; and I further agree that the taking of other additional securities or evidence of indebtedness by said Union Trust Company upon any loan, discount, credit or overdraft, or the extension or renewal thereof, shall not impair or release this guaranty. If signed by more than one, this obligation shall be deemed to be joint and several and shall be valid and enforceable against the survivor of any two or more who sign this guaranty.

"Witness my hand and seal the date above mentioned.

"MINNIE KAHN GROSMAN.

"This 23rd day of May, 1914, appeared before me Minnie Kahn Grosman, personally known to me to be the same person who signed, sealed and delivered the foregoing instrument for the purposes therein set forth.

"M. BELLE CARNAHAN,

(Seal) Notary Public.

"My commission expires March 23, 1916" (26-27).

Default having been made in the payment of these obligations, petitioner instituted suit for their collection, and simultaneously sued out a writ of attachment against property owned by Minnie Kahn Grosman in the city of Dallas (29).

The action was brought in the United States District Court for the Northern District of Texas.

Seasonably Mrs. Grosman filed a motion to dismiss as to her on the ground that she was a married woman (9), which was overruled (14). She then answered claiming the property as a homestead (16), which claim she subsequently abandoned (30), and the cause was tried purely on the coverture defense, such contest being raised by appropriate answer.

There was no contest by any of the other defendants.

Judgment was rendered against all of the defendants and against Mrs. Grosman for her proportionate part thereof, to-wit: $18,762.00, with 6% interest thereon from date thereof (21).

From this decree she appealed to the United States Circuit Court of Appeals for the Fifth Circuit (24-25), which Court on January 4, 1916, reversed the decree as to her (34-39). On the 8th of March, 1916, the Supreme Court granted the writ of certiorari (45).

The sole question, without technical references to the record, may be stated in these words:

The petitioner, a resident and citizen of Chicago, State of Illinois, was engaged in the banking business, and has so been for many years. Sometime prior to May 23, 1914, Hiram Grosman and his wife, Minnie Kahn Grosman, who were in Chicago together, entered into negotiations with the petitioner for a loan of $25,000.00. Grosman's note and security were unsatisfactory to the bank, and he thereupon offered to give his wife as surety in addition to the other security he had offered. Mrs. Grosman

was at that time a resident of the State of Texas, where she owned considerable realty. This arrangement was satisfactory to the Bank, and Mrs. Grosman executed a guaranty or suretyship contract, by the terms of which she made herself a surety for the $25,000.00 secured, and such guaranty was presented to the Bank by the husband.

Some months after Mrs. Grosman returned to her home in Texas, and after default in the payment of the borrowed money, suit was brought against her and against her husband's firm and against the individuals composing it on the contract so executed and delivered.

At the time of the institution of the suit a writ of attachment was issued and levied upon real estate in Texas which was Mrs. Grosman's separate property. She pleaded coverture and raised the question of the right of the plaintiff to have enforced by the court the contract which she had executed and delivered while she was in the State of Illinois, where the obligations were payable.

The trial court held that she was liable on her contract and gave the Bank judgment, from which she appealed, and the Court of Appeals reversed the judgment. Then followed the application for and the granting of the writ of certiorari herein.

ILLINOIS STATUTE.

The provisions of the Illinois Statute pertinent to this question are as follows:

> "Sec. 6. Contracts may be made and liabilities incurred by a wife and the same enforced against her, to the same extent and in the same manner as if she were unmarried; but except with the consent of her husband, she may not enter into or carry on any partnership business, unless her husband has abandoned or deserted her, or is idiotic or insane or is confined to the penitentiary."
>
> "Sec. 5. That a married woman may, in all cases, sue and

be sued without joining her husband with her, to the same extent as if she were unmarried and an attachment or judgment in such action may be enforced by or against her as if she were a single woman."

"Sec. 9. A married woman may own, in her own right, real and personal property obtained by descent, gift or purchase, and manage, sell and convey the same, to the same extent and in the same manner that the husband can property belonging to him (proviso relating to transfer of goods and chattels between husband and wife)."

Hurd's Rev. Stats. 1911, Chapter 68 (Act of 1874).

There is conferred by this statute upon a married woman in Illinois practically all of the rights and responsibilities of a feme sole, while practically all of the common law disabilities of coverture are removed.

PETITIONER'S MOTION FOR REHEARING IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, STATED AS ITS ASSIGNMENTS OF ERROR.

"Comes now the appellee in the above styled and numbered cause and presents this its motion for a rehearing and prays that the judgment of reversal herein entered on the 4th of January, 1916, be in all things set aside, and that the judgment of the lower court be affirmed, for the following reasons, to-wit:

"First. Because the court erred in holding that The Kensington, 183 U. S. 263, rules this case, since the opinion in that case shows that in all of the courts of the United States, as well as in many of the courts of the states of the United States, it has always been the policy to refuse to allow a common carrier to limit its liability for the negligence of its servants and that the Congress of the United States in 1893 further recognized this unbroken line of decisions by the passing of the Harter Act.

"There was, therefore, a well defined public policy in the United

States against the limiting of such liability, and the courts themselves announced that they would not allow the limiting of such liability because 'it was against public policy.'

"A Texas married woman was originally under all of the disabilities fixed by the common law, but from time to time she has been given more liberty and this liberty has been given both by the Legislature of the State of Texas and by the courts of the State of Texas until finally there came the Act of 1913, which gave her more rights than she had ever had. See also decision of one of the Texas appellate courts, in the case of Merrielles v. State Bank, 5 Tex. Civ. App. 483.

"Second. The Kensington case differs from the case at bar and should not rule it, for the reason that the refusal of the courts of the nation of the United States to accept the construction of the courts of a foreign nation of a contract in question, because such contract and construction are clearly against legislatively announced public policy and judicially announced public policy, without a single exception, is not parallel to the question presented when a domestic contract, valid in one of our home States, is presented for enforcement in another one of the forty-eight home States, especially when such latter home State has, through its own courts and through its law making bodies, expressed clearly that there is no well defined and settled policy against the enforcement or validity of such contract.

"Third. The Kensington case should not rule the case at bar because the Supreme Court, in the Kensington case, clearly indicated by the use of words, relating to the exact point at issue, that the Belgium law and the Belgium contract, would not be enforced in the United States Courts for the reason that such courts had repeatedly and unbrokenly held that such limiting conditions in contracts were in conflict with public policy, the identical language being as follows:

" 'It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago and has been so frequently reiterated, that it is elementary.'

" 'Public policy' as thus used and as understood by the courts of the present day, does not rest exclusively upon the ipse dixit or pronunciamento of a judicial opinion, but goes deeper and finds its life in an immorality or viciousness or conscienceless wrong. International Harvester Co. v. McAdam, 124 Wis. 114; 124 N. W. 1042. A contract, therefore, printed upon a bill of lading or upon a ticket, or a transportation license, oft-times in small and insignificant letters and phrases, never read, never called to the attention of the purchaser or traveler, but relied upon to relieve the carrier from its own negligence in the destruction of the passenger's property, is unthinkable to the American jurist, and shocks, and ought to shock, and always has shocked, his ideas of equity. For at least one very small reason, without naming others, namely, that the passenger and the carrier had never come together upon any express contract for such limiting, and the passenger knew nothing about it, and the acceptance of his ticket or transportation cardboard would not be permitted by the American courts to deprive him of his property.

"There is no such immorality or viciousness about the enforcement of the Texas married woman's contract in question. The facts show that she and her consort were in the State of Illinois where she, under its statutes, was a feme sole. That being thoroughly advised of the contract she was about to sign and did sign, it was presented by her husband to her, and after her signature,

returned to the appellee, who, in good faith, turned over $25,000.00 in cash.

"A recital of the facts, merely, shows the vast difference between the two cases, and makes it utterly impossible to find any viciousness or any immorality or any wrong that could be worked against the Texas married woman by the enforcement of the contract in question.

"Therefore, the action of the Texas appellate courts in the Merrielles case, and the action of the Texas Legislature from time to time broadening the rights and liberties of the Texas married women, even though it be, that the Texas courts have met such emancipation with a well-defined marking of its boundaries, show, not only that there is no viciousness or immorality or wrong in the maintenance of the validity of the contract in question, but also show that there is no settled public policy in Texas. In other words, that the trend is toward emancipation, and the 1913 Legislature, in answer to this resistless current for emancipation, announced, in the preamble to the Act, that it was for the purpose of enlarging the rights of the married women, the exact words being as follows:

" 'An Act to amend Articles 4621, 4622 and 4624 * * * concerning the marital rights of parties, defining separate and community property of the husband and wife, conferring upon the wife the power to make contracts, authorizing suits on such contracts, giving the wife control over her separate property * * *.'

"And in the emergency clause the following language is used:

" 'The fact that the present law denies to married women the right to manage their separate property and to make contracts, is unjust to a large number of citizens of this State, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended,' etc.

"Fourth. Said judgment is erroneous because, while there may be a different minority holding among the various courts of the United States, the rule is that a contract valid where executed is valid everywhere.

"Fifth. Such judgment is erroneous and the following of the same would work endless confusion in the commercial transactions among the various citizens of the different States of the United States.

"Sixth. A rehearing should be granted for the reason that such judgment is in direct conflict with the United States Circuit Court of Appeals for the Second Circuit in the case of First National Bank of Chicago v. Mitchell, 92 Fed. 565.

"Seventh. A rehearing should be granted because the trend of commerce, of legislation and of judicial decision is toward the recognition of the United States as one nation, and not as an aggregate of forty-eight different sovereignties.

"Eighth. A new hearing should be granted for the reason that the case of Cuba R. R. Co. v. Crosby, 222 U. S. 473, is not a ruling authority, for the judgment announced by this Honorable Court, in that the said case speaks solely with reference to contracts made abroad, that is, contracts made beyond the jurisdiction of the United States, and declares that our courts will not extend hospitality to such foreign contracts if they be made the cover for injustice.

"Of course, as heretofore observed, the immorality and injustice and the unrighteousness, if any there be in this case, all lie on the side of the breaking of the contract. Such attributes do not come into being and are unnoticeable when the contract is held to be valid and enforceable. In other words, there is no 'public policy' of the sort recognized by the Supreme Court in the instant case.

"Ninth. A rehearing should be granted for the reason that the opinion of this Honorable Court holding that under the laws of the State of Texas a married woman could not become a surety on any bond or obligation of another without the joinder of her husband, which is unquestionably the Texas law, would prevent the making by her of a valid contract in a State where she was not under such a disability, is erroneous, since a contract valid where made is valid everywhere, unless there be a well-defined public policy, public policy meaning, as heretofore indicated, against such validity or enforcement."

PROPOSITIONS UNDER ABOVE ASSIGNMENTS.

The following propositions will be submitted herein, and supported by authorities and argument:

FIRST.

The contract of guaranty made by Mrs. Grosman while she was in the State of Illinois, to be performed in that State, is a valid contract, and must be construed and enforced according to the laws of that State.

SECOND.

The Illinois statute authorized a married woman to contract as a feme sole, and Mrs. Grosman's contract was valid there, and being valid there, will be enforced in a Texas forum.

THIRD.

It is the policy of Texas to extend comity.

FOURTH.

There is no exception to the general proposition that a contract valid where executed and where to be performed, is valid and enforceable in any other nation, even as to nations separated by the seas, save that a contract would not be enforced in the latter nations if there were a well defined and settled public policy against

such a contract. "Public policy" as here understood, and as preventing such enforcement, means that the contract to be refused life must be vicious, or unjust, or immoral.

FIFTH.

Mrs. Grosman's contract is not repugnant to the settled "public policy" of the State of Texas.

FIRST PROPOSITION.

The contract of guaranty made by Mrs. Grosman while she was in the State of Illinois, to be performed in that State, is a valid contract, and must be construed and enforced according to the laws of that State.

AUTHORITIES.

Scudder v. Union National Bank of Chicago, 91 U. S. 406.

Pritchard v. Norton, 106 U. S. 124.

First Nat'l Bank of Chicago v. Mitchell, 92 Fed. 565; 34 C. C. A. 542.

Bowles v. Field, 78 Fed. 742.

Ryan & Co. v. M. K. & T. Ry. Co., 65 Tex. 13.

Merrielles v. State Bank of Keokuk, 5 Tex. Civ. App. 483.

Bell v. Packard, 69 Me. 105.

Milliken v. Pratt, 125 Mass. 374.

International Harvester Co. v. McAdam, 124 N. W. 1042; 26 L. R. A. (N. S.) 774.

Law v. Smith, 68 N. J. Equity 81; 59 Atlantic 327.

Thompson v. Taylor, 66 N. J. L. 253; 54 L. R. A. 585; 49 Atlantic 544.

Hill v. Chase, 143 Mass. 129.

Baum v. Birchall, 24 Atl. 620.

Ross v. Ross, 129 Mass. 243.

Gibson v. Sublett, 82 Ky. 596.

Taylor v. Sharp, 108 N. C. 377; 13 S. E. 138.
Wood v. Wheeler, 111 N. C. 231; 16 S. E. 418.
Robinson v. McQueen, 87 Tenn.; 11 S. W. 38.
Wright v. Remington, 41 N. J. L. 48.
Garrigue v. Keller, 74 N. E. 523.
Baer Bros. v. Terry, 108 La. 597.
Young v. Hart, 101 Va. 480.
Young's Trustee v. Bullen, 19 Ky. L. R. 1561.
U. S. v. Garlinghouse, 25 Fed. Cas. No. 15189.
First Nat'l Bank v. Shaw, 109 Tenn. 237.
Ruh v. Buck, 25 L. A. R. 178.
Union National Bank v. Chapman, 57 L. R. A.
Locke v. McPherson, 85 Am. St. Rep. 552.
Clark v. Eltinge, 38 Wash. 376.
Dicey Confl. Laws, page 549.
Minor Confl. Laws, par. 171.
Wharton Confl. Laws, par. 401-427 e.
Mayer v. Roche, 26 L. R. A. (N. S.) 763.

ARGUMENT.

As to personal contracts, the law, as to their validity and interpretation, is that of the place where they were made, the *lex loci contractus*, unless the parties thereto intended that they should be governed by the law of the place of performance, the *lex loci solutionis*, or of some other place. The place of the contract is, generally speaking, a matter of mutual intention, but the intended place as determined by legal presumption in some cases and evidentiary circumstances in others, settles all questions as to the legal test of validity and interpretation. Such presumption, in the absence of evidence to the contrary, is that the place of making and performance in a physical sense is the place in a legal sense;

but the place of performance when different from that of the actual making, is the place in such legal sense, subject to the presumption being rebutted by clear evidence of intention, this being again subject to some exceptions in case of intention to commit a fraud on the law, such exceptions being possible but rare, and not concerned in the case in hand.

The note and guaranty in this case were executed and delivered in the State of Illinois, where each was payable, and where the makers thereof were under no legal disability.

Logically deduced from these authorities and from this reasoning, is the conclusion that a contract which is valid in the place where made and to be performed is valid everywhere.

The law of one State having, *ex proprio vigore*, no validity in another State, the enforcement of a foreign contract which would not be valid by the law of the forum where its enforcement is attempted, depends upon comity which is extended for that purpose, as a matter of right, unless the agreement is contrary to the "public policy" of the State of the forum, in that it is contrary to good morals, or the State or its citizens would be injured by the enforcement, or it perniciously violates positive written or unwritten prohibitory law, and the extent to which comity will be extended is largely a matter of judicial policy to be determined within reasonable limitations, by each State for itself.

These rules and this doctrine, that the law of the place of a contract governs as to its interpretation and validity, applies to the capacity of parties, including that of married women, to bind themselves in the manner attempted.

International Harvester Co. v. McAdam, 26 L. R. A. (N. S.) 778.

Story Confl. L., par. 103, 241.

Milliken v. Pratt, 125 Mass. 374.

First National Bank of Chicago v. Mitchell, 92 Fed. 565.

Bowles v. Field, 78 Fed. 742.

Merrielles vs. State Bank of Keokuk, 5 Tex. Civ. App. 484.

And authorities cited supra.

SECOND PROPOSITION.

The Illinois statute authorized a married woman to contract as a feme sole, and Mrs. Grosman's contract was valid there, and being valid there, will be enforced in a Texas forum.

AUTHORITIES.

Hurd's Rev. Stats., 1911, Chap. 68 (Act of 1874), Ill.

First National Bank of Chicago v. Mitchell, 92 Fed. 565; 34 C. C. A. 542.

Bowles v. Field, 78 Fed. 742.

Merrielles v. State Bank of Keokuk, 5 Tex. Civ. App. 483.

Milliken v. Pratt, 125 Mass. 374.

Baum v. Birchall, 24 Atl. 620.

Bell v. Packard, 69 Me. 105.

Phila. Savings Fund Society v. Chas W. Lasher, et al., 144 Illinois App. 653.

Speer's Law of Married Women in Texas.

Wharton Confl. Laws, Vol. 1, 3rd Ed., pp. 15-16.

Texas Married Women's Act of June 19, 1913.

Also authorities cited under First Proposition.

THIRD PROPOSITION.

It is the policy of Texas to extend comity.

AUTHORITIES.

Ryan & Co. v. M. K. & T. Ry Co., 65 Tex. 13.

Merrielles v. State Bank of Keokuk, 5 Tex. Civ. App. 483.

In the Ryan case by the Supreme Court of Texas, cited above, that Court upheld and enforced a contract contained in a bill of lading, which was valid under the laws of Missouri, where made, but in valid in the State of Texas, where sued upon, and in passing thereon said:

> "The law of our State in which the contract was in part to be performed, forbidding such restrictions, it is of vital importance to ascertain whether the validity of the contract is to be governed by the law of Texas or that of Missouri * * *." "To give validity to the contract, and thus carry out the intentions of the parties, we must apply to it the laws of the former State, and it is our opinion that by these laws its validity must be determined. This principle is applied frequently to cases where a contract is made in one State for the payment of money in another. Although the contract is to be wholly performed in another State, where the rate of interest agreed upon is usurious, yet, if by the *lex loci contractus* it is lawful, the interest may be recovered * * *." "This rule also obtains when there is a conflict of laws as to the capacity of the parties to the contract."

These views were expressed by the Supreme Court of Texas, upholding a contract which, under its legislation, was vicious, denied, and, therefore, would be against its "public policy," as contended for by the defendants in this case. The Legislature of the State of Texas had, by special enactment, prohibited common carriers from limiting their common law liability by restrictions contained in their bills of lading.

In the Merrielles case, cited above, another one of the courts of Appeals of the State of Texas enforced against her the contract of a married woman, evidenced by certain promissory notes executed by her and valid in the State of Iowa, where executed, but invalid in the State of Texas, where sued upon, and in so holding, said:

"Appellant, in her fourth assignment, complains that the court erred in submitting to the jury the laws of Iowa to create a liability against the separate real estate of a married woman situated in Texas, contrary to the Constitution, laws and public policy of Texas, and in overruling the motion for a new trial based on this ground.

"Without undertaking an extended discussion of this question, we express the conclusion that the court correctly applied the law of Iowa, the *lex loci contractus*, in the enforcement of the obligations in suit. This action, we think, was justified by the views of our Supreme Court in Ryan v. Ry., 65 Tex. 13."

These two cases show conclusively that Texas, like all of its sisters, is not only bounden to extend comity, but delights to do so. When a contract is valid in another State, and the one bounden thereby breaches it and has refuge in Texas, such refuge must be short lived, otherwise discredit would quickly follow not only such a State, but likewise its courts.

It is no answer to these cases to cite a long list of Texas decisions wherein the courts have refused to allow the binding of a Texas married woman upon her contract made in Texas, because that is quite a different matter, and as we shall see in the Fifth Proposition hereafter, a married woman's liberty in Texas is being constantly enlarged, and it is only a matter of a few years when she shall be completely emancipated from the disabilities of the common law and the original barbarities of early legislation and decisions.

FOURTH PROPOSITION.

There is no exception to the general proposition that a contract valid where executed and where to be performed, is valid and enforceable in any other nation, even as to nations separated by the seas, save that a contract would not be enforced in the latter nations if there were a well defined and settled public policy against such a contract. "Public policy" as here understood, and as pre-

venting such enforcement, means that the contract to be refused life must be vicious, or unjust, or immoral.

AUTHORITIES.

International Harvester Co. v. McAdam, 124 N. W. 1042; 26 L. R. A. (N. S.) 774.

The Kensington, 183 U. S. 263.

Insurance Company v. Head, 234 U. S. 161.

N. P. R. Co. v. Babcock, 154 U. S. 190.

Third Volume U. S. Supreme Ct. Rep. Ency., pp. 1031-2-3 and pp. 1045-6.

ARGUMENT.

"Public policy," as furnishing the excuse for the failure of the forum to enforce a so-called foreign contract, is that which has something inherently bad about it, something shocking to one's sense of what is right as measured by moral standards. In the judgment of the courts, something pernicious and injurious to the public welfare. Milliken v. Pratt, supra; International Harvester Co. v. McAdam, supra. Greenhood on Public Policy, at p. 36, says that:

> "When a contract is valid under the public policy of a State where made, it will be enforced in another State, although the same would, by the statute laws of the latter State be void, unless its enforcement would exhibit to the citizens of the State an example pernicious and detestable."

All of the authorities agree that a contract in order to be non-enforceable on the ground of the "public policy," must be, therefore, vicious, or unjust, or immoral.

The learned Justice of the Supreme Court of the State of Wisconsin, in rendering that very late decision in the International Harvester Co. case, cited supra, says:

"It will occur to one, on a moment's reflection, that the

rule could not be otherwise, else the doctrine that a contract valid at the place where made is valid and, generally speaking, enforceable everywhere, would be wholly nullified as to foreign contracts which would not be valid if made in the place where enforcement is sought. The rule would be useless since, in every case of such a contract it would never be enforceable except in the place where made. The correctness of the rule and the absurdity of the idea that every contract which, if made in the jurisdiction of the forum, would not be valid, cannot be enforced there, are so clear that we would hardly be justified in dealing with the numerous elementary principles leading up to the final solution of the proposition upon which this appeal must be grounded, were it not for the obvious fact that the case was decided below and the judgment is sought to be sustained here, upon the theory, merely, that because such a contract as that in question would not be valid if made here, it necessarily cannot be enforced in our courts, though it is perfectly valid where it was in fact made."

Under this very salutary rule of law, which is most necessary for the stabilizing of commercial contracts in the United States, the courts have almost universally enforced contracts made in outside jurisdictions which were against the legislation and judcial interpretation of their own State on similar contracts made therein, with reference to usury, the statute of frauds, the statute of limitations, married women's contracts, release of liability in bills of lading, etc., etc.

Manifestly no immorality or viciousness or injustice can be comprehended in the case under discussion. That the enforcement of a contract will result in the payment of an honest debt can never be said to be immoral or vicious or unjust.

As said by the Supreme Court of the United States in Brodnax v. Insurance Co., 128 U. S. 244, 32 Law Ed. 447:

"It is not wrong in itself for a wife of her own free will, to devote her separate property to the relief of her husband. Obedience to the dictates of duty, or even yielding to the im-

pulse of affection, has in itself no tendency to impair the happiness of the family but the contrary."

Chief Justice Fuller, in that same decision, after making use of the foregoing language, quoted approvingly the following excerpt from the Supreme Court of Georgia, as given in the case of Sutton v. Aiken, 62 Ga. 741:

> "It is evident that it is not wicked or immoral for a wife to pay her husband's debts, nor has the general public an interest in her abstaining from so doing. The restraint imposed upon her by the law is solely for her benefit and well being. The rule is economical, not moral; and its policy is in favor of a class, and not of the public at large. True, the class is a numerous and important one, but married women cannot be said to constitute the public. The public justice, police order, safety, revenue, health, religion or morality is not involved in preventing wives from devoting their property to the payment of their husbands' debts."

Justice Gray of the Massachusetts Supreme Court, in the Milliken case, said:

> "The general rule is that the validity of a contract is to be determined by the laws of the State in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a State whose laws do not permit such a contract. Scudder v. Union National Bank, 91 U. S. 406. Even a contract expressly prohibited by the statutes of the State in which the suit is brought, if not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the State, as administered by its courts, will refuse to entertain an action on such a contract, made by one of its citizens abroad in a State the laws of which permit it."

Those words were used in a case where a married woman's contract valid where made, but invalid in her domicile, was under consideration and enforced, and even at that early date, 1878, the Justice said:

> "But it is not true at the present day that all civilized States

recognize the absolute incapacity of married women to make contracts. The tendency of modern legislation is to enlarge their capacity in this respect and in many States they have nearly or quite the same powers as if unmarried."

So likewise, in the International Harvester Co. case, Justice Marshall, in upholding a married woman's contract valid where made, but inhibited by the laws of Wisconsin, said:

"How can the court say that it should be so classed, that it should be located within the broadest possible boundaries of the immoral, the inherently bad? Nearly all the common-law disabilities of women to contract have been removed. They can acquire and enjoy property and make all contracts necessary or convenient in that regard. There is little left of a business nature which men can do that they cannot do. They have nearly all the rights of man, and some besides, and on all sides are making pressing claims with distinguished support for what is yet withheld not very firmly nor perhaps very logically. How can the ordinary business contract in question, so common among men of ordinary preceptions, be said to be contrary to any policy of this State heretofore, or which should now be, adjudged bad in the interest of good morals?"

FIFTH PROPOSITION.

Mrs. Grosman's contract is not repugnant to the settled "public policy" of the State of Texas.

AUTHORITIES.

Merrielles v. State Bank of Keokuk, 5 Tex. Civ. App. 483.

Speer's Law of Marital Rights in Texas (New Ed.).

Preamble and Emergency Clause of the Act of 1913, relating to Husband and Wife, General Laws Thirty-Third Legislature, pp. 61-62, Texas.

ARGUMENT.

In the Merrielles case a Texas court of appeals upheld a married woman's contract valid under the laws of Iowa and invalid under the laws of Texas, and enforced its penalties against her

real estate situated in the State of Texas, and this in the face of the fact that the laws of the forum nearly always regulate when property is in question which is situated in the State of the forum.

Constantly the Legislature of Texas has been enlarging a married woman's right, and this ripened into the Act of 1913, in the preamble of which the Legislature expressed its desire for a more complete liberty for the married women of Texas, and in the emergency clause of that law, in the following words:

> "The fact that the present law denies to married women the right to manage their separate property and to make contracts, is unjust to a large number of citizens of this State, creates an emergency and an imperative public necessity * * *."

Again, in the preamble to the law, it is said:

> "An Act to amend Articles 4621, 4622 and 4624, Title 68, Chapter 3, of the Revised Statutes of Texas, 1911, concerning the marital rights of parties, defining separate and community property of the husband and wife, conferring upon the wife the power to make contracts, authorizing suits on such contracts, giving the wife control over her separate property, placing limitations upon such control, giving her control, etc., * * * ."

That the contract sued upon here cannot be regarded as inherently harmful, is evidenced by the fact that contracts of similar nature are permitted by the written laws of a large portion of the States, and in most others legislation in that direction is progressive, and they are recognized as not inherently bad by substantially all the courts of this country, the exceptions to which are significant.

It is inconceivable that any mind, judicial or lay, could conclude that a contract made by a Texas married woman in the State of Illinois, by virtue of which a citizen of Illinois parted with $25,000.00 in cash for the benefit of the married woman and her husband, was against the "public policy" of Texas, and, therefore,

unenforceable in a Texas court, since the very highest evidence of individual righteousness is the payment of an honest debt. There is nothing to corrupt the morals of the Texas people, nor to work an injustice to the Texas people, nor to display immorality before the Texas people, in the payment of a debt which one of the Texas people has made with and to a trusting citizen of the State of Illinois.

THE 1913 ACT OF THE TEXAS LEGISLATURE.

So far as the Act of 1913 is concerned, petitioner does not believe that it is material whether under its terms the contract of guaranty would be valid or invalid in the State of Texas, but it is most valuable for petitioner's rights, in that it shows, that there is no well defined "public policy" in Texas against the right of its married women to contract, and to that extent, of course, the 1913 act is of an assisting nature.

If, however, it were necessary to controvert the opinion of the Court of Appeals rendered in this case, wherein the decision of the lower court was reversed, it would seem that even under the 1913 Act, the contract which is now sought to be enforced, was not only valid in Illinois, but likewise valid under the law of the State of Texas!

The fact that the wife is guarantor of the husband's note, in itself constitutes an essential joinder between husband and wife, just the same as the wife becoming "joint maker of a note" (as provided for in the proviso of the Act of 1913 we are considering) with the husband would constitute such a joinder of the husband with the wife as would render any further requirement of joinder by the husband ridiculously unnecessary. Could it be seriously contended that if a wife went on a joint note with the husband, as is expressly permitted by the new law, in the proviso thereof,

and happened to sign her name below that of the husband's, instead of above, that the husband would have to again sign his name below her's, in order to "join" her in her part of the contract? This is a *reductio ad absurdum* which applies just as forcefully to facts in this case as to the facts imagined. The law provides:

> "Provided, the wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract."

It has been the policy of Texas, almost since the days of the Republic, to permit a wife to mortgage her separate property, joined by her husband, to secure a debt of her husband's. Does the husband exercise a "disinterested concurring judgment" in the case? Can it be seriously contended that it was the intention of the Legislature to permit a married woman to go outside of the partnership of her family and become surety for a third party, wholly without consideration, merely with the joinder of the husband, and not be able to become surety for her husband? Any benefit the husband received from her suretyship inures directly to her benefit and to the benefit of their community estate. It is of course not so in the case of suretyship for a third person.

It would seem that at the time of the execution of the guaranty sued on there was no settled policy in the State of Texas, or that the contract is contrary to any law thereof, while, on the contrary, it would seem that the contract in question is expressly permitted by the laws of Texas, and would in all probability, if it had been entered into in Texas, be held valid and enforceable by the Texas courts.

A married woman in Texas, even before the law of 1913, was far removed from the woman of common law disability. Speer on the Law of Married Women in Texas. So far, therefore, from there being a positive prohibition by statute in Texas, our law ex-

pressly confers upon married women the power to contract and to charge their separate property, and even before this law the policy and spirit of the forum was in accord with the remedy sought here, as shown in the Merrielles case and in the general tendency of the law as shown in Speer. While since 1913 the law of the forum is substantially the same as the law of Illinois.

Judge Ocie Speer, who for many years sat as a Justice upon one of the Courts of Civil Appeals of the State of Texas, in his new edition on the Law of Marital Rights in Texas, published in 1916, writes as follows:

"§ 145. *At common law.*

"At common law, since the existence of the wife was by fiction of law merged in her husband, she could, of course, make no contracts. Her sole power to make contracts at all was dependent upon his authority expressly given her to act for him, or impliedly given by law for the purchase of such things as necessaries for herself and children. While this fiction of unity was a creature of the common law, and is said to be not recognized by us, yet it is to this alone that all the disabilities of coverture are traceable. It accounts for her inability to contract with strangers, with her husband, her inability to make conveyances, and to sue and be sued. We have only in part forsaken it. By that fiction she could make no contract binding herself or her separate estate. In equity, however, she might bind her estate, but not herself personally. All her contracts, agreements, covenants, promises, and representations were regarded as void for the reason already stated, since the law has always required that there should be at least two parties to every contract, and the wife, not being sui juris, was not able to meet this requirement."

"§ 146. *Prior to act of* 1840 *adopting the common law.*

"Even with us prior to the adoption of the common law, and while the Spanish law obtained, she could make no contract except with the assent of her husband. And the general rule was that in the disposition of her paraphernal property this assent had to appear upon the instrument conveying, or

must at least be given. But this was not without exceptions. He might ratify the act done without his assent, either before or after it was done. The law assumed as a basis for requiring this assent, that any disposition of the wife's property would be injurious to the husband, inasmuch as he was entitled to the use and fruits of such property for the support of the family. Hence, a disposition of it without his assent might operate as a prejudice to this right. However, since this was the test and the reason for requiring such assent, if he refused, and it appeared that the proposed contract was an advantageous one to the wife, and therefore to him, the court could confer such authority upon the wife, contrary to her husband's wishes. Even where the contract was made by her without his assent or the permission of the court, nevertheless, if it appeared that such contracts were advantageous to her, and not to his prejudice, they would be upheld as valid. His assent might be presumed after a great lapse of time in which he acquiesced in his wife's transfer of her property."

"§ 147. *Statutes; their scope and object; act* 1848.

"Perhaps every decision yet handed down in the state involving the right of a married woman to contract has been under the statutes of 1848 and others, prior to the amendment to be noticed in the next succeeding section, and what is here said is intended to give an exposition of the rule under those acts.

"The wife may contract debts for necessaries furnished herself or children, and for all expenses which may have been incurred for the benefit of her separate property. While we have discarded the fiction of the unity of husband and wife, it is plain that our lawmakers did not intend to fully emancipate the wife and permit her to exercise all the civil rights accorded to the unmarried. And the special authority to make the contracts enumerated fairly indicates that it was intended to restrict her power to those reasonably falling within that class. Those expressly mentioned, together with those contemplated herein as determined by judicial interpretation, are the exclusive instances where she can create a liability against herself by contract, and the courts have uniformly been exceedingly careful that the contract was fairly embraced within the statute before permitting a recovery, for the statute further requires

that such should satisfactorily appear to authorize a judgment. These acts must be held to have forbidden any other contractual liability upon her part. The liability growing out of these contracts is a personal one, and such contracts are not dependent upon the assent of her husband for their validity.

"The object doubtless was to provide a rule, complete within itself, for the determination of the wife's powers to bind herself and property, and not leave such to be determined by the rules of the common law, nor yet the Spanish law, from both of which systems ours differs in very material matters, and the essence of it is that, by specially authorizing her to make certain enumerated contracts, she is, impliedly at least, forbidden to make any other."

"§ 148. *Same; amendment of* 1913.

"By act of the 33d Legislature, p. 61, article 4624 of the Revised Statutes, which has for more than a half century been the sole authority for a married woman's contracting at all, was amended so as to read as follows:

" 'Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents, and revenues from her separate property, shall be subject to the payment of debts contracted by the wife, except those contracted for necessaries furnished her or her children; provided, the wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract.' The act recites in the emergency clause that the fact that the present law denies to married women the right to make contracts is unjust, and creates an imperative public necessity—that the constitutional rule requiring bills to be read on three several days be suspended. The caption of the bill, among other objects, names 'conferring upon the wife the power to make contracts.'

" 'When it is considered that the old law, with its well-recognized limitations upon the right of a wife to contract, is, for that reason, considered by the lawmakers to be unjust, and the declared object, as expressed in the caption of the bill, is to confer upon the wife the power to make contracts, the purpose to remove the unjust restrictions and to enlarge the contract capacity of married women is apparent, and the act

in pursuance of such purpose should be liberally construed with a view of accomplishing the end desired. Generally speaking, under the old law a wife could not contract. This was considered to be, as it was, unjust. It is just that wives should be allowed to contract, and the whole purpose of the act upon this point is to empower them to do so, except as they are forbidden in the act itself.'

" 'It is to be observed the language of the amending article is radically different from that of the amended. The old article specially authorized the wife to contract certain liabilities, which by a well-known rule of construction forbade any other. The new article forbids her making a contract of joint liability on a note, or of suretyship on any bond or obligation of another without the joinder of her husband with her in making such contract, and by the same well-known rule of construction necessarily authorized her to make any other contract. In other words, the change wrought is, that where the power to contract was originally denied generally, but authorized specially, it is now denied specially and authorized generally. Under the terms of the present law a married woman can make any contract an unmarried woman can make, with the sole exceptions named in the statute. This view is supported and rendered well nigh conclusive by the painstaking reservation in the amending article that 'neither the separate property of the husband nor the community other than the personal earnings of the wife, and the income, rents, and revenues from her separate property, shall be subject to the payment of debts contracted by the wife, except those contracted for necessaries for herself or her children.' The old article, which had always been held to restrict her right to contract, has been repealed, and another substituted exempting certain property from liability for her contracts, and forbidding her specially to make a certain class of contracts without the joinder of her husband. From the history of the legislation, the consideration of the well-known and expressed evil intended to be remedied, and the general language of the bill, with its limitations specially expressed, there can be no other conclusion than that the legislature intended to confer upon married women the power generally to contract, subject only to some minor limitations.'

" 'Much that has been decided heretofore has, therefore,

lost its importance, and is noticed in subsequent places merely for its proper value in tracing the history of the law, and in some measure aiding us in a proper estimation of the present statutes.' "

"§ 149. *Could not bind herself generally under statutes prior to* 1913.

"So that, with us, the general rule has been, as at common law, that the wife cannot by contract bind herself or her separate property. The act of 1840 adopting the common law, but securing to the wife her separate property, did not in any manner authorize her to make any contract whatever, and imposed upon her no liability to be sued upon any contract she may have entered into during coverture; the object being simply to guard her separate estate. The act did not in any way alter the rule at common law as to her capacity to contract, and hence the early influence, and in a measure the adoption, of the common-law rule of the wife's disabilities. So, in view of the influence of the common law thus exerted, and of the obvious policy of our laws to restrict the general power of the wife to contract, it is well settled that she cannot make a binding contract upon herself, except it be for a purpose pointed out by law, and in the manner provided by law if such manner be provided. Unless a demand is premised upon these things, no liability appears. She is prima facie unable to contract at all. The exception authorizing her to act must be alleged and proved."

* * * * * * * *

"If the proper interpretation has been placed on the amendment of 1913, and the wife is now empowered to contract generally, she may, of course, make any contract she pleases with her husband, provided the same violates no rule of law. Equity might scan it more closely than it would other contracts, but this has nothing to do with her capacity."

"§ 152. *May bind herself; when.*

"Prior to the amendment of 1913, the decisions have been uniform in the holding that a married woman could not contract a debt except for one of the specific purposes allowed by the statute. Since the amendment, she has been, it would seem, authorized to contract as a feme sole, with the limitation noticed in § 148. So that now she may prima facie enter

into agreements that an unmarried woman could make, and if the particular undertaking is one reprobated by law, that fact must affirmatively appear, to render the same ineffective. A married woman's contract has never been void merely because of her coverture, but it was voidable only by her at her option, by a plea and proof of her coverture; though there are many loose expressions to the effect that such voidable contracts are void."

"By a timely defense, she may now avoid her contract by showing her coverture and the fact that the obligation attempted to be enforced is that of a joint maker of a note or a surety on another's obligation, without her husband's joinder in such contract. But this appears to be the extent of coverture as a disability to contract. Indeed, it is hardly proper to longer speak of coverture as a disability to contract, since the change effected by the recent legislation appears almost completely to remove the legal disability of married women to contract. The change is revolutionary from the lawyer's standpoint, but is full tardy enough in view of the progressive legislation in this respect by many of our sister states, and the general awakening of public thought in revolt against the archaic rules of barbarous feudal times."

United States District Judge Sheppard, in Maxwell v. Jurney, 238 Fed. 567, in an opinion which was affirmed by the Circuit Court of Appeals for the Fifth Circuit, shows the right and power of the wife, under the present emancipating statutes of the State of Texas to contract with her husband.

COMITY.

One of the earliest Supreme Court decisions on "comity" is the case of Hilton v. Guyot, 159 U. S. 113. In that decision Mr. Justice Gray reviews expressions from Mr. Justice Story and from Chief Justice Taney and from Mr. Wheaton and other eminent authorities, and himself concludes, that "'Comity,' in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the

legislative, executive, or judicial acts of another nation, having due regard to the rights of its own citizens or of other persons who are under the protection of its laws." The case was one considering the validity of a judgment rendered in a nation other than the United States when offered in a United States court for enforcement.

I submit the rule with reference to comity as between the States of the United States is less rigorous and more brotherly. That is, it has a stronger obligation for recognition than when the question is between the United States of America and some other nationality beyond the seas.

That I am correct in this will be noted from Article 4, Section 1, of the Constitution adopted by the States of this Republic, wherein they provided that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.

So, too, these States are bounden together for mutual protection. They fight for one another. They tax themselves for one another. Their representatives and senators sit side by side in the same Congress. Their flag is one, and their ruler is the same man. It is, indeed, quite a stretch of logic to assume, therefore, that Texas and Illinois shall occupy a position toward the laws of each other, and toward the sacredness of contracts made within the borders of each, of foreign nations. They are not different nations—they are equal parts of the same nation.

It is respectfully prayed that the judgment of the Court of Appeals be reversed and the judgment of the District Court be affirmed.

WILLIAM HAWLEY ATWELL,
Solicitor for Petitioner, Union Trust Company.

Supreme Court, U. S.
DEC 20 1917
JAMES D. MAHER,
CLERK.

No. 106.
(387).
(25145).

In the Supreme Court of the United States

UNION TRUST COMPANY,
Petitioner,

v.

MINNIE KAHN GROSMAN, et al,
Defendants.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

SUPPLEMENTAL BRIEF FOR PETITIONER.

WILLIAM HAWLEY ATWELL,
Solicitor for Petitioner,
Union Trust Company.

W. M. Warlick, Dallas, Texas. Law Printing. Phone M. 4991.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

SUPPLEMENTAL BRIEF FOR PETITIONER.

Chief Justice Taney, in Bank v. Earle, 13 Pet. 519, 10 L. Ed. 274, said:

> "The intimate union of these states as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship and kindness, towards one another, than we should be authorized to presume between foreign nations."

This decision was especially approved by Mr. Chief Justice White, speaking for the court, in the case of Bond v. Hume, 243 U. S. p. ..... (decided Feb. 17, 1917), in these words:

> "It is certain that these principles which govern as between countries foreign to each other apply with greater force to the relation of the several states to each other, since the obligations of the Constitution which bind them all in a common orbit of national unity impose of necessity restrictions which otherwise would not obtain, and exact a greater degree of respect for each other than otherwise by the principles of comity would be expected. It is unnecessary to cite authority for these several doctrines since, as we have said, they are indisputable, but they nowhere find a more lucid exposition than that long ago made by Mr. Chief Justice Taney in Bank of Augusta v. Earle."

In the case of Bond v. Hume, the "public policy" of Texas was a material and fully presented issue because the contract upon which the suit was based, by a criminal statute of the State of Texas, was unlawful and void and a crime, but under the laws of the State of New York, where it was made, it was legal.

In the same paragraph of the decision from which the foregoing excerpt is taken, there is a clear exposition of the fundamentals involved in the doctrine of "comity" and "public policy," and I, therefore, quote the same:

> "It is obvious on the face of the pleadings, as stated in the certificate that the contract, the enforcement of which was sought, was valid under the laws of the state of New York, the place where it was entered into and where it was executed, and this validity was not and could not be affected by the laws of the State of Texas, as, in the nature of things, such laws could have no extra territorial operation. This conclusion is, however, negligible, as the question is not whether the contract was valid, but whether, being valid under the law of New York, it was susceptible, consistently with the laws of Texas, of enforcement in the courts of the United States, sitting in that state. And this question involves the inquiry: Was there any local public policy in the State of Texas which, consistently with the duty of the courts of that State under the Constitution to give effect to a contract validly made in another state, was sufficient to warrant a refusal by the courts of that state to discharge such duty?

"A statement of a few elementary doctrines is essential to a consideration of this issue. Treating the two states as sovereign and foreign to each other, —New York, under whose laws the contract was made and where it was valid, and Texas, in whose courts we are assuming it was sought to be enforced,—it is elementary that the right to enforce a foreign contract in another foreign country could alone rest upon the general principles of comity. But, elementary as is the rule to comity, it is equally rudimentary that an independent state under that principle will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or, in other words, violate the public policy of the State where the enforcement of the foreign contract is sought. It is, moreover, axiomatic that the existence of the described conditions preventing the enforcement in a given case does not exclusively depend upon legislation, but may result from a judicial consideration of the subject, although it is also true that the courts of one sovereignty will not refuse to give effect to the principle of comity by declining to

> enforce contracts which are valid under the laws of another sovereignty unless constrained to do so by clear convictions of the existence of the conditions justifying that course. And finally, it is certain that, as it is peculiarly within the province of the law making power to define the public policy of the State, where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under a foreign law, comity will yield to the manifestation of the legislative will and enforcement will not be permitted."

Then follows the excerpt first quoted.

"PUBLIC POLICY."

"Public Policy," as furnishing an excuse for the failure of the forum to enforce a valid foreign contract, is that which has something inherently bad about it, something shocking to one's sense of what is right as measured by moral standards. In the judgment of the courts, something pernicious and injurious to the public welfare.

Milliken v. Pratt, 125 Mass. 374.

International Harvester Co. v. McAdam, 124 N. W. 1042; 26 L. R. A. (N. S.) 774.

Greenwood on Public Policy, p. 36.

Corpus Juris, vol. 12, p. 440, contains this language:

> "In considering whether the exercise of the doctrine of comity would be contrary to the public policy of the jurisdiction, the distinction between regulative legislation and the adoption of a principle of public law must not be lost sight of; the fact that a particular act or contract is prohibited by statute in the particular jurisdiction will not necessarily require the withholding of a remedy on a right arising from an act or contract performed or made in another jurisdiction."

Under this text, the following illustration is used:

> "To declare, as the common law did, that the welfare of society required that wives be incapable of making contracts is an illustration of the adoption of a principle which, so long as it was adhered to, constituted a rule of public policy. When, however, civilized states became satisfied that the welfare of society was not best served by the maintenance of this principle, it was abandoned by the recognition of its opposite, viz., that married women possessed capacity to contract. The question that then arose, viz., what contracts might they make, and what might they not, while calling for the exercise of legislative discretion, based upon con-

siderations that affect a large class of individuals, did not, either in theory or in fact, involve any principle upon which the general welfare of the body of citizens of the state was assumed to rest. With the abandonment of the political principle, the matter was broken up into discretionary exercises of legislative regulation, in the course of which different bodies, or the same legislative body, at different periods, might lay down varying rules without destroying that comity that is so essential to commercial confidence and intercourse. Thus in the case certified it appears that the State of New York, having abandoned the principles of the common law, as we ourselves have done, has gone further in its enabling legislation, or what is the same thing, has retained less of what the common law rule compelled, but equally in either case the only principle involved has been abandoned. The respective regulations of the subject equally rest upon the common ground that women have a capacity to make contracts, subject to legislative control. If this be so, comity requires that we mutually give effect to those discretionary acts by recognizing the validity of the resulting contracts and enforcing them in our courts even when they are in opposi-

> tion to our own declared discretion upon the subject." Thompson v. Taylor, 66 N. J. L. 253, 49 A. 544, 88 Am. S. R. 485, 54 L. R. A. 585.

In Milliken v. Pratt, supra, it was held that a contract made in Maine by a married woman domiciled in Massachusetts, which a married woman was not at the time capable of making under the law of Massachusetts, but was then allowed by the law of Maine to make, and which she could not lawfully make in Massachusetts, would sustain an action against her in Massachusetts.

To the same effect is the case of Garrigue v. Kellar, 164 Ind. 676, 74 N. E. 523, 108 Am. S. R. 324, 69 L. R. A. 870, which determined that:

> "Under the Illinois statute which permits a married woman to subject herself to liability as surety, a note executed in Illinois by a married woman as surety, while domiciled in that State is valid and enforceable in Indiana, although it is made payable at a bank in the latter state, and the statute thereof prohibits a married woman to enter into a contract of suretyship."

In the case at bar, the married woman was a citizen of Texas, but was in Illinois at the time she made the

contract, and the contract which she did make was payable in the state of Illinois and was valid there.

In International Harvester Co. v. McAdam, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774, 20 Ann. Cases 614, it was said:

> "A contract * * * is not, necessarily, contrary to the public policy of a state, merely because it could not validly have been made there, nor is it one to which comity will not be extended, merely because the making of such contracts in the place of the forum is prohibited, general statutes to the contrary notwithstanding. * * * It will occur to one, on a moment's reflection, that the last foregoing rule could not be otherwise, else the doctrine that a contract valid at the place where made is valid and, generally speaking, enforceable everywhere, would be wholly nullified as to foreign contracts which would not be valid if made in the place enforcement is sought. The rule would be useless since, in every case of such a contract, it would never be enforceable except in the place where made."

In the same decision the court says that:

> "The dividing line * * * is at the point where inherent harmfulness commences."

In the case of Ruhe v. Buck, 124 Mo. 178, cited by defendants, is criticised at page 464 of Corpus Juris, vol. 12, in the following words:

> "The law of the forum has been held, in a comparatively recent Missouri case, to prevent a remedy from being sought on a contract valid where made, this case would appear, however, to be contrary to the general current of authority."

A perusal of the well considered brief on the subject of Conflict of Laws in that volume of Corpus Juris, beginning at page 438 and extending through page 465, confirms the justness of the criticism.

> "In a general way it may be said that public policy means the public good. Anything that tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against public policy. Speaking generally, the principle which holds that no one can lawfully do that which has a tendency to be injurious to the public, or against the public good, may be termed the policy of the law, or public policy in relation to the adminis-

> tration of the law." Goodyear v. Brown, 155 Pa. 514, 26 A. 665, 35 Am. S. R. 903; Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, A. 70; Boston R. Co. v. Mercantile Trust Co., 82 Md. 535, 34 A. 778, 38 L. R. A. 97.

Again:

> "Precisely what public policy is in any given case may frequently be a matter of contention, and its application a subject of dispute. The strict meaning of the expression 'has never,' says Mr. Storey, in his work on Contracts, Section 546, 'been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. This rule, however, may be safely laid down; that whenever any contract conflicts with the morals of the times and contravenes an established interest of society, it is void as being against public policy.' " Pueblo v. Taylor, 6 Colo. 8, 45 Am. R. 512.

It is beside the question to suggest in any American forum that the American married woman is still the common-law slave. In every state, not excepting Texas, she has been liberated and given the right to contract, and, of course, there is no immorality, nor viciousness, nor question of morals in the maintenance

of her contracts wherein she obligates herself to pay honest debts. Viciousness and immorality would result from a failure so to do.

NO SETTLED PUBLIC POLICY IN TEXAS AGAINST THE ENFORCEMENT OF A MARRIED WOMAN'S CONTRACT.

In the case of Merrielles v. State Bank of Keokuk, 5 Tex. Civ. Ap. 483, one of the appellate courts of Texas unheld a married woman's contract valid under the laws of Iowa, but then invalid under the laws of Texas, and enforced its penalties against her real estate situated in the State of Texas.

The Legislature of Texas in 1913 announced as follows in the Emergency Clause of an Act of that date:

> "The fact that the present law denies to married women the right to manage their separate property and to make contracts, is unjust to a large number of citizens of this State, creates an emergency and an imperative public necessity." * * *

Again, in the preamble of that law, it is said:

> "An act to amend Articles 4621, 4622 and 4624, Title 68, Chapter 3, of the Revised Statutes of Texas, 1911, concerning the marital rights of parties, defining separate and community

property of the husband and wife, conferring upon the wife the power to make contracts, authorizing suits on such contracts, giving the wife control over her separate property, placing limitations upon such control, giving her control, etc. * * *."

TEXAS EXTENDS COMITY.

The decisions of the Supreme Court of the State of Texas in the case of Ryan v. M. K. & T. Ry., 65 Tex. 13, and the Court of Civil Appeals of the State of Texas in Merrielles v. State Bank of Keokuk, 5 Tex. Civ. Ap. 483, and the Court of Appeals of the State of Texas in So. Pac. v. Dusablon, 106 S. W. 767, clearly show that there is no disposition on the part of the Courts of Texas not to extend comity.

It is respectfully asked that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit be reversed, and that the judgment of the United States District Court for the Northern District of Texas be affirmed.

WILLIAM HAWLEY ATWELL,
Solicitor for Petitioner,
Union Trust Company.

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The Following are Cases Cited by Appellant Which In Fact Support Appellee's Propositions.

Baer v. Terry, 29 So. Rep. (La.) 886.

Building Ass'n. v. Griffin, 90 Tex. 480.

International Harvester Co. v. McAdams, 142 Wis. 114.

Madden v. Blain, 86 Ga. 780.

Preble v. Baldwin, 6 Cush. (Mass.) 549, 553.

Pritchard v. Norton, 106 U. S. 124, 129.

The Following are Obsolete Texas Cases Cited by Appellant.

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Belcher v. Weaver, 46 Tex. 296.

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Billingsley v. Swenson Land Co., 123 S. W. 194.

Burnham v, Carter, 113 S. W. 782.

Cannon v. Boutwell, 53 Tex. 626.

Crouch v. Crouch, 70 S. W. 595.

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No. 2831.

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT.

MINNIE KAHN GROSMAN, et al.,

Appellants,

vs.

UNION TRUST COMPANY,

Appellee.

Appeal from the District Court of the United States For the Northern District of Texas.

BRIEF FOR APPELLEE.

[Figures in parenthesis indicate pages in the Record and to prevent repetition the word "Record" is not used at all.]

STATEMENT OF NATURE AND RESULT OF SUIT.

Because the statement of the appellants is rather tautly drawn, I consider it appropriate to present the facts in a different way.

Appellee is a banking institution in the city of

Chicago. Sometime prior to May 23, 1914, the appellants, Hiram Grosman, and wife, Minnie Kahn Grosman, were in Chicago, and after having been there some time, came to appellee's place of business and sought a $25,000 loan (42-44). The negotiations therefor covered a week or more, during which time appellee was making investigations as to the sufficiency of some securities that Grosman offered as collateral (44). The loan as thus secured by Grosman was not satisfactory to the bank, and further security was asked, and Grosman presented to the bank the written guaranty shown in the record, executed by appellant, Minnie Kahn Grosman, in the State of Illinois and before a notary public (42-44, 37-38).

Upon the securities and the written guaranty of Mrs. Grosman, all of which were presented to the appellee by Hiram Grosman, Minnie Kahn Grosman's husband, the loan was made and the bank's money turned over to Hiram Grosman (42-44). Appellants Hiram Grosman and his wife, Minnie Kahn Grosman, were in the State of Illinois, to-wit: in the city of Chicago, at the time of the securing of the money and the execution of the papers and guaranties with reference to the repayment thereof, and they were there together (42-44). Hiram Grosman, the husband, appellant, secured and brought to the appellee, the written guaranty of his wife, appellant Minnie Kahn Grosman (42-44).

Thereafter a further loan, amounting to $3,404.00, was secured by appellants from appellee (37). The $25,000.00 note was dated May 23, 1914, and was due four months after date (37). The written guaranty secured by Hiram Grosman, signed and acknowledged by Mrs. Minnie Kahn Grosman, was dated May 23, 1914, and was deliver-

ed to the appellee by Hiram Grosman, the husband, at the same time that the $25,000 note was delivered, such guaranty being in the following words:

"Chicago, May 23, 1914.

For value received, at the time of the execution hereof, and in consideration of and to induce the Union Trust Company to continue or extend credit, guarantee unconditionally, and at all times during the continuance hereof, the full and prompt payment unto the Union Trust Company, of the principal and interest as the same becomes due, or as the same may become payable under any extension or renewal thereof, made during the life hereof, of all loans, discounts, credits and overdrafts which may heretofore have been made, or may hereafter be made or allowed (including all costs, attorney's fees and other outlays of the guaranteed in enforcing same, and in enforcing this guaranty) by said Union Trust Company against Hiram Grosman & Company to the full amount of all credits and not exceeding twenty-five thousand ($25,000.00) dollars, and agree that this guaranty shall be a continuing one and be and continue to be binding, without any notice to the undersigned of its acceptance, or of the making of an extension or renewal or demand for, or notice of non-payment at maturity, of any of such loans, discounts, credits or overdrafts, all such notice or demand and all other notice or demand being expressly waived; and further, that this guaranty shall remain and be in full force from time to time and apply on all loans, discounts, credits and overdrafts and all renewals and extensions thereof made prior to and until said Union Trust Company shall receive notice in writing by the undersigned of the discontinuance of this guaranty as to any further loans, discounts, credits or overdrafts, and upon such notice being so received, this guaranty shall not extend to any loans, discounts, credits or overdrafts thereafter made by said Union

Trust Company, but shall remain in force until full payment of any loans, discounts, credits and overdrafts then existing; and I further agree that the taking of other additional securities or evidence of indebtedness by said Union Trust Company upon any loan, discount, credit or overdraft, or the extension or renewal thereof, shall not impair or release this guaranty. If signed by more than one, this obligation shall be deemed to be joint and several and shall be valid and enforceable against the survivor of any two or more who sign this guaranty.

Witness my hand and seal the date above mentioned.

MINNIE KAHN GROSMAN.

This 23rd day of May, 1914, appeared before me Minnie Kahn Grosman, personally known to me to be the same person who signed, sealed and delivered the foregoing instrument for the purposes therein set forth.

M. BELLE CARNAHAN,
Notary Public.

(Seal)

My commission expires March 23, 1916." (37-38).

Default having been made in the payment of these obligations, appellee instituted appropriate action for their collection and simultaneously sued out a writ of attachment against a valuable piece of business property owned by appellant, Minnie Kahn Grosman, in the city of Dallas (40-41).

Seasonably Minnie Kahn Grosman filed a motion to dismiss as to her on the ground that she was a married woman and enjoying the protection of coverture at the time she entered into the contract sued upon (11-12). Such motion was duly submitted and the court denied and overruled the same (18). The appellant Minnie Kahn Grosman raised the same question by answer, seasonably filed (19-22). There was no contest by any of the other appellants.

Judgment was rendered for appellee in the sum of $18,762.00, with interest at six per cent from date of said judgment (29).

Appellants seasonably perfected their appeal, basing the same upon seven errors set forth in an assignment (32-34). All of these assignments are abandoned, save and except two which are presented in as many propositions and are known in appellant's brief as First Proposition (p. 5) and Second Proposition (p. 26).

APPELLANTS' TWO PROPOSITIONS.

Such propositions are aptly and succinctly worded as follows:

FIRST PROPOSITION.

Appellant's purported contract of guaranty made the basis of the action against her is repugnant to the settled public policy of the State of Texas, and is prohibited by her laws.

SECOND PROPOSITION.

The purported contract of guaranty, being repugnant to the public policy of the State of Texas and contrary to her statutory enactments, may not be enforced by a Texas court upon the principle of comity.

APPELLANT'S STATEMENT OF THE CASE.

In the first place, appellant states that she undertook "wholly without consideration to herself" to guarantee, etc. I challenge the correctness of the statement. The use of the $25,000.00 capital for a length of time was an asset to the husband, and in like manner, to the wife. Presumably, and in the ordinary course of events, the use of capital would have resulted in profit to the user. It was certainly not appellee's fault if it did not.

If profits had been made, they would have inured, in community, jointly to the husband and wife. Nor would she have refrained from using such profits for herself, had they been made. The laws of Texas have long permitted, as is set forth by appellee, a wife to mortgage her separate real estate to secure a debt of the husband. This is but fitting. It is only when a person steps out of a community interest, and becomes surety for the debt of some wholly separated person, that there is sometimes a lack of consideration.

In the second page of the statement, counsel for appellant announces (p. 2, brief), in accented type: "Such written instrument was not executed for necessaries for the appellant, nor for necessaries for her children, nor for the benefit of her separate property." **Why this statement?** The old law providing that a married woman could not contract except for necessaries for herself or children or for the benefit of her separate property, has been entirely superseded by the new law of 1913, which was in effect at the time the contract in question was made. The new law provides, in substance, that the wife may contract debts and subject her separate property, the income therefrom and her personal earnings to the payment thereof, and that in addition thereto, if the debts so contracted are for necessaries for herself and children, the husband's separate property, income therefrom, and earnings, may also be subjected to their payment.

Later, in the statement (p. 2, brief) appellant says: "Obviously appellee knew that appellant was a resident and citizen of the State of Texas at the time it accepted said written instrument, that she was a married woman,

and that her property was in the State of Texas, etc." The law of the *lex loci contractus* is founded on the presumption that persons are supposed to intend the consequences of their acts according to the laws of the place where the acts take place. Is not the ancient rule of justice, from which the fixed law has grown, more equitable than the inference sought to be drawn by appellant? Appellant, together with her husband, was in Chicago. They entered into obligations there together, such obligations to be performed there. For years and years married women have been able to contract, sue, and be sued, as femes sole, in Illinois. Is it equitable to attempt to charge appellee, contrary to the presumptions of law, and contrary to law, with certain MERE TECHNICALITIES of the laws of Texas, the requirements of which are, even now, unsettled, and the subject of much heated argument, pro and con, among Texas lawyers? The big fact remains that they are mere technicalities. Appellant impliedly admits, in her brief, that had Hiram Grosman written his name under Minnie Kahn Grosman's on the guaranty, at the time that Minnie Kahn Grosman, at his request, and probably not five feet from him, wrote her name thereon, that the contract would not only have been valid in Illinois, but valid in Texas, and, of course, enforceable here.

I contend that the weight of modern decisions is to the effect that a married woman's contract, valid where made or to be performed, or, stronger still, where both made and to be performed, is valid and enforceable anywhere and everywhere.

Appellant admits that the contract in question is valid **and enforceable in Texas**, unless repugnant to the

settled public policy of the State of Texas or prohibited by her laws.

APPELLEE DENIES APPELLANT'S FIRST PROPOSITION.

Taking up the question from appellant's standpoint, I submit that the contract in question is not repugnant to the settled public policy of the State of Texas, nor is it prohibited by her laws.

Appellant's long and detailed argument seeking to establish her first proposition, viz: that the contract in question is repugnant to the settled public policy of the State of Texas and is prohibited by her laws, is mainly litigious sophistry.

Near the beginning of the argument (p. 7 brief) appellants' counsel unintentionally made a serious misstatement of fact. They say:

"By the Act of March 13, 1848, married women were empowered to contract debts for necessaries furnished for themselves and children, and for the benefit of their separate property. This statute, changed somewhat in phraseology, was carried into all of the revisions and now constitutes Article 4624, R. S. of Texas, 1911. * * *"

This statute, or the substance thereof, does NOT now constitute Article 4624, R. S. of Texas, 1911, nor did it at the time the contract in question was entered into. Article 4624 R. S. of Texas, 1911, was superseded by Acts 1913, p. 61, Sec. 1, amending Art. 4624, Rev. Stat. 1911, which now appears as Art. 4624, Vernon Sayles' Texas Civil Statutes, 1914.

The new Article 4624 is not a revision of the Article 4624 Rev. Stat. 1911. It is a sweeping change in the law, in that it gives to married women the general power to

contract (which fact is admitted by appellant when he comes to discuss this same section under another title) (See first paragraph, p. 19, brief). In addition, it provides that the husband's separate property may also be subjected to the payment of the debts contracted if they are for necessaries for the wife and children.

Before the passage of this law, a married woman could enter into no contracts whatever, joined or unjoined by her husband (the joinder made no difference) unless for necessaries for herself or children or for the benefit of her separate property.

The new law took effect in July, 1913. The contract in question was entered into May 23, 1914. Does this sweeping change of law indicate that the public policy of the State of Texas relating to the legal status of married women was SETTLED? It would be difficult to imagine anything less "settled." The only thing that is settled about it is the constant and decided trend toward the placing of the married woman on the same footing as the feme sole.

There then follow three and a half pages of brief made up of references to and quotations from (some in black type) **obsolete** Texas cases, arising under the old law, the law which became surepseded before the contract in question was entered into, and which can have no possible bearing on the issues being considered (pp. 8, 9, 10, 11, brief). Obsolete Texas decisions can form no part of the present "settled public policy" of the State.

Since an early day, as shown in pp. 11 and 12 of appellants' brief, a married woman has been enabled to convey her separate property and to mortgage the same

to secure a debt of her husband's, if joined by the husband. It has therefore always been the settled policy of the State of Texas to permit a wife, by way of mortgage, to subject her separate property to the payment of debts contracted by the husband. Broadly speaking, there is no difference in principle between permitting her to mortgage her separate property to secure a debt of the husband and making a valid contract of suretyship to secure a debt of the husband. Either way, she subjects her separate property to the payment of her husband's debt. We are considering this matter only as bearing on the **public policy** of the State of Texas, not the laws of the State of Texas. Technical matters relating to the form and manner of execution of the obligation sued on can properly have no weight in determining the public policy of the State. The laws of Texas only apply as contributing to and shaping the public policy and are a very different thing from the public policy of Texas:

Wharton Confl. Laws, Vol. 1, 3rd Ed., pp. 15-16.

International Harvester Co. v. McAdam, 124 N. W. 1042.

Greenhood on Public Policy, p. 46.

In pages 13, 14 et seq. of her brief, appellant argues in support of the proposition that the contract in question is positively prohibited by Texas statute and therefore the ordinary comity cannot be extended.

The big, vital fact stands out from the first paragraph of the discussion (pp. 13-14, brief), that married women, by the very section of the new law wherein appellant finds the alleged prohibition, are given the general pow-

er to contract and also the power to enter into contracts of suretyship. Their separate property is subjected to the payment of debts contracted by them. The general enactment is limited by the provision that: "The wife shall never be the joint maker of a note, or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract."

The legislative wisdom, mindful of the hazard of suretyship, and the duty which each spouse owes to the other during coverture, expressed in the Act a clear intention of preventing the wife from stepping outside of the family and becoming a surety for a third person, unless by and with the consent of the husband positively indicated in some form. The statute does not specify the exact mode of the joinder. The statute does not say "joint signature" as in another part of the Act, nor "joinder in the manner now provided by law for the conveyance of the wife's real estate," but just "joinder."

On page 14 appellant's counsel says:

"In some of the States in which married women have been wholly emancipated by statute, it has been nevertheless held that the intention was by such statutes to remove her disabilities for her interest, and not to enable her to contract onerous obligations from which she derived no benefit," citing Athol Machine Co. v. Fuller, 107 Mass. 437; West v. Laraway, 28 Mich. 464; Harris v. McCaslan, 31 S. C. 420; Gwynn v. Gwynn, 31 S. C. 482 and DeVires v. Conklin, 22 Mich. 255.

Not one of these cases supports the proposition announced. They are all old cases in States at a time when the law permitted married women only a limited

power to contract, for the benefit of her separate property, etc.

The case of Athol Machine Co. v. Fuller, supra, involved a suit on a married woman's note signed in 1870, at a time when married women by statute in Massachusetts were permitted to make contracts **only** for the benefit of their separate property.

The case of DeVires v. Conklin, supra, involved a suit on a married woman's note, signed in 1870, at a time when married women by statute in Michigan did not have the general power to contract, but only power to make contracts affecting her own estate, etc. The note was one of surety for a third person.

The case of West v. Laraway, et al., supra, is an old Michigan case almost exactly similar to the case of DeVires v. Conklin, supra.

The case of Harris v. McCaslin, supra (1889), involves a wife's contract of suretyship for her husband at a time when such contracts were expressly prohibited by statute.

The case of Gwynn v. Gwynn, supra (1889), involves a wife's contract which was held **not** for the benefit of her separate property at a time when she could only contract for the benefit of her separate property.

It will thus be seen that **not one** of the cases cited by appellant involves the consideration of a contract made under statutes "wholly emancipating" married women.

Joinder.

Beginning on page 15 of the brief, appellant discusses the interpretation of the word "joinder" in the proviso clause of the statute requiring the joinder of the husband

when the wife becomes joint maker of a note or surety on the bond or obligation of another. She cites Woodward v. Seaver, 38 N. H. 29 to support the proposition that "a contract in which the husband does not so join is wholly void." The case of Woodward v. Seaver, supra, involves a deed made by the wife of her separate property. The husband joined by signing later. It was held valid. There was no question of contract in the decision one way or the other.

We are indebted to counsel for appellant for the citation of the case of Bray v. Clapp, et al., 80 Me. 277, 13 Atl. 900 (1888), which contains an illuminating discussion of the whys and wherefores of the requirement of "joinder" by the husband in the wife's transactions. The case involved the conveyance of the wife's separate real property in Maine at a time when the statute required the joinder of the husband. Of course the conveyance was to a third party. The court said:

"**The statute exacts the joinder of her husband, not as a grantor, because he has nothing to grant, but as an assenter merely, for he has only the power to withhold to give his assent. He joins in the deed, not to convey or assist in conveying anything, but to assent that she may convey her own title. The only possible right which she has in her lands is that of dissenting from her conveyance, and that he waived by assenting to it.**"

Could anything be more helpful in rescuing this simple question from the tortuous labyrinths devised by counsel's ingenuity?

On page 15, appellant cites the case of Harvard Publishing Co. v. Benjamin, 84 Md. 333, 35 Atl. 930. The

decision in this case turned upon quite a different point than appears in counsel's exposition thereof. In this case it was held that the maker of a note and the indorser thereof, **who is also payee**, cannot be joined in one action on the note, their contracts being separate and distinct, and that therefore a wife who is maker and a husband who is PAYEE AND INDORSER, since they cannot be sued jointly on the note, do not come within the Maryland statute providing that a married woman may be sued jointly with her husband on any note, bill, contract, etc., which she may have executed jointly with him.

In the case of Schroder v. Turner, 68 Md., 506, 13 Atl. 331 (not cited by appellant), another Maryland case, where the note was drawn by the husband, **payable to a third party,** and the wife endorsed the note, it was held that husband and wife could be sued jointly since the contract was a joint one.

In Texas and elsewhere, a guarantor and principal obligor may properly be sued jointly in an action on the debt. Phipps v. Willis, 11 Tex. Civ. App. 186; 32 S. W. 801. Tooke v. Taylor, 31 Tex. 1. Vogelsang & Bros. v. Mensing & Bro., 1 App. Civ. Cases, Sec. 1164. Dublin Cotton Oil Co. v. Robinson (Civ. App.), 50 S. W. 1054.

The contract of principal and guarantor is therefore held to be a joint one in Texas. Thus the fact that the wife is guarantor of the husband's note, in itself constitutes an essential joinder between husband and wife.

Appellee cheerfully admits that "What cannot ever be valid, is never valid, and what is never valid is always

void" (p. 16, appellants' brief). Logic in a nutshell. The unfortunate part of its applicability to the case at bar is the fact that appellant expressly ADMITS that the contract in question is valid. In fact, his whole argument is built up on that admission. "The rule that a contract, valid by the law of the place thereof, is valid everywhere, is without exception" * * (International Harvester Co. v. McAdam, 124 N. W. 1042).

Another.

Appellant discusses the case of Warner Elevator Co. v. Houston, 28 S. W. 405 (pp. 16-17, brief), and seeks to interject into one sentence of the opinion thereof a fine spun distinction based upon a substance so shadowy as to be negligible. The sentence is: "The words 'other person' used in a statute following the enumeration of certain classes of persons always means persons other than those enumerated." The contention is that since the word "another" does not follow the word "husband," that the doctrine announced in the case has no bearing on the statute we are considering. Elsewhere in the opinion in the same case (at page 408) the court says:

"It is evident that the designation of the class 'other persons' does not and was not intended to include original contractors, for they are separately named as a special class * * *"

It was evident that the word "another" was not intended to include the husband, as he is separately named in the same clause.

Appellant cites the case of Elliott v. City of Brownwood, 166 S. W. 1129 (p. 17, brief), holding that the word

"another" in a death injury statute means "another person" and could not, therefore, embrace a municipal corporation.

On the next page (18), Allen v. Beebe, 43 Atl. 681, is cited, in which it was held: "No amount of casuistry can alter the fact that a corporation is 'another person' distinct in law from the natural or artificial persons who hold its stock."

In fact, the case of Elliott v. City of Brownwood, supra, and its prototypes, are the single exception, it appears, to the general rule in all the States that "another" embraces all corporations, persons, bodies politic, etc. I W. & P. 407.

The Supreme Court of Texas has recently held, however, in the case of Commerce Cotton Oil Co. v. Camp, 145 S. W. 902, that the same word "another" in the same statute, includes a private corporation, and this case has been followed by the Court of Civil Appeals at San Antonio, in the case of Williams v. Coca Cola Company (Tex.), 150 S. W. 759.

The case of Allen v. Beebe, 1899, supra, cited by appellant on p. 18 of her brief, involves consideration of a statute of New Jersey that the disability of a married woman remains as at common law in so far as her promise to pay the debt of another person is concerned, unless on the faith of such promise she "obtains, directly or indirectly, any money, property, or other things of value, for her own use, or for the use, benefit or advantage of her separate estate." The case does not involve the contract of suretyship of a married woman for her husband, but for a corporation of which she was stockholder.

The case of Preble v. Baldwin, 6 Cush. (Mass.), 549, 553, cited in the first paragraph of p. 18 of appellants' brief, is directly in point and strongly sustains appellee's contention, as readily appears from appellant's statement. Appellant says (p. 18, brief):

"The Statute of Frauds bears a striking resemblance. It provides that no action shall be brought 'to charge any person to answer for the debt, default, or miscarriage of **another**' (Article 3965, R. S. Tex. 1911). The settled interpretation, therefore, of the word 'another' as employed in the Statute of Frauds should, we submit, exert a controlling influence, and as so employed the word 'another' must be understood **as referring to a third person, and not to a debt due from either of the contracting parties**" (Preble v. Baldwin 6 Cush. (Mass.), 549, 553).

Of course! And could anything be more logical and sensible and more illuminating when applied to a construction of the statute under consideration?

In this case the words of the court are as follows:

"However this may be we think it clear that the defendant's contract is not within either branch of the statute of frauds; for, whether the plaintiff or the defendant became the debtor, when the taxes were assessed, the defendant's promise was not to pay the debt of a third person; and was not within the words and true meaning of the statute; the words of which are, that 'No action shall be brought to charge any person, upon any special promise, to answer for the debt of another.' The word 'another' we think must be understood **as referring to a third person, and not to a debt due from either of the contracting parties.**

"It was accordingly held, in the case of Eastwood v. Kenyon, 11 Ad. & El. 438, 446, that a promise by one man to another to pay debt due from the latter to a third person, was not within the statute."

In our statute the legislature intended that the "obligation of another" should be the obligation of a third person, and not the obligation of one of the two named and contracting parties, the husband and wife.

Article 4624.

Appellant admits (first par. p. 19), that Article 4624 confers "upon a married woman a contractual power that did not theretofore exist." As we have seen appellant has signally failed to support her contention that this enactment is limited by a positive prohibition that covers the contract in question. The alleged prohibition, even ascribing to it the tortured meaning claimed by appellant, DOES NOT PROHIBIT. It simply provides the manner in which contracts of suretyship should be entered into by a married woman. The admitted facts in this case show that there was an ACTUAL joinder of husband and wife in the contract of suretyship. The prohibition claimed by appellant can, at the best, be one involving a MERE TECHNICALITY and not the substance of the law. The contract in question is ADMITTEDLY VALID. The very most that appellant claims is that it cannot be enforced in the jurisdiction of her domicile **if positively prohibited by the Statute of the domicile.** Appellant does not deny that the law of Texas permits a married woman to enter into contracts of suretyship. The greatest limitation contended for by appellant is that she must be joined by her husband in so doing. In no particular way—just joined. In this case,

she executed the contract of guaranty at the husband's request to secure his debt on the same day that he signed his contract of indebtedness and the husband delivered both papers together to appellee.

Purpose of Act of 1913.

Appellant discusses (pp. 20, 21 and 22, brief) the general purpose of the statute of 1913 and the evil sought to be cured by the legislature in enacting the same, ascribing certain imagined theories and purposes to the legislature and even referring to the laws of California to assist in understanding the purpose of the Texas Legislature.

It might be well to note here that the legislature EXPRESSED its purpose in writing in the emergency clause when it enacted the law. The legislature said: (Sec. 2), p. 62, Acts of 1913:

"The fact that the present law denies to married women the right to manage their separate property **and to make contracts** is unjust to a large number of citizens of this State, creates an emergency, and an imperative public necessity * * *"

There is, as stated by appellant, nothing conflicting between the Texas Act of 1911 and the Act of 1913. The later Act controls, however (Madden v. Blain, 86 Ga., 780, cited by appellant), and since it gives married women the general power to contract, it renders the Act of 1911 almost nugatory. It would be only under very exceptional circumstances, that a married woman now would need the relief afforded by the Act of 1911.

On page 23 of her brief, appellant cites again the Maryland case of Harvard Publishing Co. v. Benjamin, supra, as authority for the proposition that the laws

of Texas require the technical joinder of the husband in the wife's contract of suretyship, even if such contract of suretyship is for the husband.

We have previously considered this case in detail and have shown that the contract of principal and guarantor is held to be a joint one in Texas, and that probably, under a similar state of facts, such a contract as the one involved in this case, would be held to be joint in Maryland.

The fact that the wife is guarantor of the husband's note, in itself constitutes an essential joinder between husband and wife, just the same as the wife becoming "joint maker of a note" (as provided for in the proviso of the Act of 1913 we are considering) **with the husband** would constitute such a joinder of the husband with the wife as would render any further requirement of joinder by the husband ridiculously unnecessary. Could it be seriously contended that if a wife went on a joint note with the husband, as is expressly permitted by the new law, in the proviso thereof, and happened to sign her name below that of the husband's, instead of above, that the husband would have to again sign his name below her's, in order to "join" her in her part of the contract? This is a *reductio ad adsurdum* which applies just as forcefully to facts in this case as to the facts imagined. The law provides:

"Provided, the wife shall never be **the joint maker of a note** or **a surety on any bond or obligation of another** without the joinder of her husband with her in making such contract."

On page 23, appellants' brief, it is announced that: "The Act of 1913 must be construed, we submit, as to-

tally incapacitating the wife from becoming surety for the husband." This statement is not supported by any law or authorities, but by the further statement "the evident purpose of the statute was to require, as a condition precedent to the wife's becoming surety at all that **she have the disinterested concurring judgment of her husband.**" And this in the teeth of the admitted fact that it has been the policy of Texas, almost since the days of the Republic, to permit a wife to mortgage her separate property, joined by her husband, to secure a debt of her husband's! Does the husband exercise a "disinterested concurring judgment" in the case? Can it be seriously contended that it was the intention of the legislature to permit a married woman to go outside of the partnership of her family and become surety for a third party, wholly without consideration, merely with the joinder of the husband, and not be able to become surety for her husband? Any benefit the husband receives from her suretyship inures directly to her benefit and to the benefit of their community estate. It is of course not so in the case of suretyship for a third person.

It is respectfully submitted that appellant has entirely failed to show that the contract in question is repugnant to the settled public policy of Texas, or that Texas had a **settled** public policy at the time of the contract relating thereto, or that the contract is contrary to prohibition of law, either implied or positive, but on the contrary, that the contract in question is **expressly permitted** by the laws of Texas and would, in all probability, if it had been entered into in Texas, be held valid and enforceable by the Texas courts.

APPELLEE CHALLENGES APPELLANTS' SECOND PROPOSITION.

Appellant starts out, in his argument, to support the proposition:

"The purported contract of guaranty being repugnant to the public policy of the State of Texas and contrary to her statutory enactments will not be enforced by a Texas court upon the principle of comity,"

with the general theory (p. 27, brief), in substance, that when the law of the domicile and the law of the forum coincide, or rather when the settled policy of the domicile or positive prohibition of law thereof at the time of entering into the contract, is repugnant to the idea of such a contract, and the contract is sought to be enforced in the forum of the domicile, that such policy or prohibition will govern and prevent the enforceability of the contract. Appellant makes the statement that an examination of all the conflicting cases will show that such difference of fact as to the domicile of the married woman will reconcile the cases. I have carefully examined all the cases cited by appellant, and most of the other available cases, and nowhere does the decision swing upon that theory. As far as appellee can find, Mr. Freeman, in his note on Locke v. McPherson, 85 Am. St. Rep. 571, and perhaps Elliott on Contracts, cited by appellant, are the only two writers that have advanced this theory. It is, at best, only an attempt by textwriters to reconcile the law announced in some of the obsolete cases with the law announced in the modern cases, which is an impossible feat. None of the decisions advance this theory.

Appellant says (p. 28, brief): "In International Har-

vester Co. v. McAdam, 142 Wis. 114; 124 N. W. 1042, a married woman, a citizen of South Dakota, contracted an obligation in that State, and subsequently removed to Wisconsin, wherein she was sued upon such obligation and therefore, the suit was entertained and the obligation enforced."

Though the fact of domicile is as stated, the fact is not even mentioned by the court in its long, exhaustive and admirable opinion. The opinion is a conclusive brief in itself on the precise question before this Court in this case, for appellee, and discusses the proposition of public policy of a State in a most enlightening way. Since the case is a late one (1910, Supreme Court of Wisconsin) it seems advisable to quote from the opinion somewhat at length. The salient points of the decision are as follows:

"The rule that a contract, valid by the law of the place thereof, is valid everywhere, is, without exception, notwithstanding in some cases a foreign contract is not enforceable.

"A foreign contract of a class which if it were made in the country of the forum would be contrary to the law thereof, is not necessarily unenforceable in such forum because such a contract is contrary to public policy. To be so, a contract must be, by moral standards in the judgment of the court, pernicious and injurious to the public welfare."

"The contract of a married woman as an accommodation maker of commercial paper having not been judicially declared unenforceable in this State on grounds of public policy, nor prohibited by legislation as pernicious, is enforceable in our courts, in case of its having been

made in another State, where such contracts are valid, unless such contracts are, in fact, inherently bad in the sense indicated in the foregoing rules.

"The general legislative policy of this State as to relieving married women from common-law disabilities of contract, and other considerations, negative the idea that full right in that regard would involve anything inherently bad."

Taking up the question more in detail, Judge Marshall says:

"A contract under the foregoing is not, necessarily contrary to the public policy of a State, merely because it could not validly have been made there, nor is it one to which comity will not be extended, merely because the making of such contracts in the place of the forum is prohibited, general statements to the contrary notwithstanding. In Milliken v. Pratt, supra, the court remarked substantially, even a contract expressly prohibited by the statutes of the State in which the suit is brought, if not in itself immoral (the term immoral being used in its broadest sense) is not necessarily, nor usually deemed so invalid that the comity of the State, as administered by its courts, will refuse to entertain an action under the circumstances to enforce it. There must be something inherently bad about it, something shocking to one's sense of what is right as measured by moral standards, in the judgment of the court, something pernicious and injurious to public welfare. In Greenhood on Public Policy at p. 46, cited by counsel, the following rule is deduced from the authorities cited:

" 'When a contract is valid under the public policy of the State where made, it will be enforced in another

State, although the same would by the statute laws of the latter State be void, unless its enforcement would exhibit to the citizens of the State an example pernicious and detestable.'

"It will occur to one, on a moment's reflection, that the last foregoing rule could not be otherwise; else the doctrine that a contract valid at the place where made is valid and, generally speaking, enforceable everywhere, would be wholly nullified as to foreign contracts which would not be valid if made in the place enforcement is sought. The rule would be wholly useless since, in every case of such a contract, it would never be enforceable except in the place where made. The correctness of the rule and the absurdity of the ideas that every contract which, if made in the jurisdiction of the forum would not be valid, cannot be enforced there, are so clear * *"

Justice Marshall goes on to discuss the opportunities for conflict in decisions along this line, and says:

"The opportunities for conflict referred to have operated efficiently as to the proposition under discussion, as illustrated by cases holding that, in the circumstances here they cannot be enforced [citing the same cases cited by appellant, which we will discuss later] **WHILE THE GREAT WEIGHT OF AUTHORITY IS TO THE CONTRARY** upon the ground that such a contract is not against the policy of the law in the sense that the term is used in contesting whether the foreign law of a contract as to its validity can be enforced. **ON THIS VERY POINT MANY CITATIONS MIGHT BE GIVEN. THE FOLLOWING ARE BUT A FEW OF THEM:**

"Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321; Garrigue

v. Kellar, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870; Baer Bros. v. Terry, 108 La. 597, 32 So. 353, 92 Am. St. Rep. 394; Young v. Holt, 101 Va. 480; 44 S. E. 703; Baum v. Bircheall, 150 Pa. 164, 24 Atl. 620; 30 Am. St. Rep. 707; Young's Trustee v. Bullen, 19 Ky. La. Rep. 1561, 43 S. W. 687; Gibson v. Sublett, 82 Ky. 596; Robinson v. McQueen, 87 Tenn. 445, 11 S. W. 38, 3 L. R. A. 214; Bell v. Packard, 69 Me. 105, 31 Am. Rep. 251; Bowles v. Field (C. C.), 78 Fed. 742; First National Bank of Chicago v. Mitchell, et al., 92 Fed. 565, 34 C. C. A. 542.

"The industry of counsel resulted in bringing to our attention three judicial authorities to support the negative of the proposition under consideration, which seem to be sufficiently in point to warrant noticing them * * *"

The opinion should really be quoted in full, but the attention of the Court is here directed to the opinion in its entirety, and the following additional excerpt is quoted:

"That such contracts are not to be regarded as inherently harmful, is evidenced by the fact that they are permitted by the written law of a large portion of the States, and in most others legislation in that direction is progressive. It is further evidenced by the fact that they are recognized as not inherently bad by substantially all the courts of this country. The exceptions are not significant * * *"

Not once, in this able opinion, does the court refer to the fact that the married woman's previous domicile was in the State of the making of the contract. The old doctrine of the *lex domicilii* with relation to married women has been for so many years entirely obsolete, that it is not even mentioned in this opinion. The dis-

tinction appellant seeks to make was not made, and in fact is not made in any of the decisions so far as the writer is able to discover.

Appellant seeks to rob the Texas case of Merreilles v. State Bank, 5 Tex. Civ. App. 483 of its weight in this behalf by pointing out that Mrs. Merrielles was never a citizen of Texas. True. But this fact, so far as the decision shows, played no part therein. With this exception the cases are identical, and the case of Merrielles v. State Bank is of great weight in this connection in exhibiting the public policy of the State of Texas. The burden is on appellant to affirmatively show a Texas decision wherein a repugnant policy has been announced. No such decision has been advanced, even before the new law was effective.

On page 29 of her brief, appellant says: "We have shown that the laws of Texas enabling married women to become surety only when joined by their husbands, negative the validity and enforceability of a surety contract otherwise undertaken;" citing **some obsolete Texas cases;** and also quoting from the opinion in an old Texas case. It is difficult to answer such assertions with patience. In this case we have only to do with a new statute effective July, 1913, upon which, as yet there have been no decisions.

Page 29, appellant says: "It must be conceded that had appellant's contract been made in Texas with a citizen of Texas, under the identical circumstances, no recovery in any of the courts of Texas could be had thereon." Appellee is very far from conceding any such proposition. On the contrary, appellee asserts, and its assertions are borne out by the authorities and argument

in this brief, that had appellant's contract been made in Texas with a citizen of Texas, under identical circumstances, that a recovery COULD be had thereon.

Appellant on page 30 cites Ruhe v. Buck, 124 Mo. 178, which is one of the few cases holding against appellee's proposition, but which contains an able dissenting opinion, which is a very tower of judicial and logical expression.

Appellant's argument, pp. 30-31, brief, involves a contradiction in terms. How can the policy of Texas be "settled" if the tendency is to enlarge the contractual power of married women? Since the statute, **admittedly,** expressly permits married women to contract, expressly including contracts of suretyship, appellant's contentions relating thereto certainly lack force, to say the least.

Appellant, to support her contention, on page 31, brief, cites a list of cases which is practically the same list of cases discussed by Justice Marshall in the opinion in International Harvester Co. v. McAdams, supra. We can not do better than to quote his opinion thereon. He says (page 1046, 124 N. W.).

"Armstrong v. Best, 112 N. C. 59, 17 S. E. 14, went upon the obviously erroneously theory that the law of the forum, as to the capacity of parties to contract, governs. This was stated without citation of authority."

"In a later case, Hanover National Bank v. Howell, 118 N. C. 271, 23 S. E. 1005, the court made an effort to place its doctrine on a more logical ground. After all the court seems to have doubted the soundness of its position, and rather invited legislative assistance for the purpose of avoiding it."

Discussing Hayden v. Stone, et al., 13 R. I. 106, another of these cases, he said: "The infirmity of the logic, when tested by elementary principles, is apparent at once."

"Thompson v. Taylor, 65 N. J. L. 107, 46 Atl. 561, dealt with a married woman's agreement to be bound as an accommodation maker, as in this case, in face of an express prohibitory statute forbidding such agreements. The court recognized the general rule declared in the leading case of Milliken v. Pratt, but concluded that the legislature, having condemned such contracts as harmful, that constituted a public policy for the State."

In discussing this list of cases as a whole, Justice Marshall says: "They either in principle support Milliken v. Pratt, supra, and the numerous cases we have cited, or go upon the ground that in the particular instance merely the manner of the enforcement of the contract was involved, which is governed by the law of the forum, or the contract, though made in the foreign State, relating to real property in the State of the forum, was not a mere personal contract enforceable in personum, but one enforceable in rem. All these distinctions must be borne in mind. Failure to do so has led some courts sometimes into awkward positions, and at others worked great prejudice to parties."

Our patience is again strained by appellants' statement, at the bottom of page 31: "Again, the statute of Illinois necessarily relates only to such married women as act as sole traders in that State," citing Goldsmith v. Ladson, 9 Mackey, 220. This case is a District of Columbia case involving a District of Columbia married woman's contract with a New York merchant. The case

necessarily involves and does involve the laws of the District of Columbia and a special statute of the State of New York relating to sole traders. It has nothing on earth to do with the Illinois statute, and of course could not, by analogy, relate thereto. Appellant, in the same breath, cites cases involving married women having her disabilities removed by decree in one State and then removing to another. It was held, of course, that the decree had no extra-territorial effect. The questions involved were not at all in line with those here.

Appellant says, in the next paragraph: "If appellants' purported obligation is enforceable, it follows that had she made the same in Texas, payable in Chicago, and forwarded it there, it would also have been enforceable, whereas the law is to the contrary," citing Hager v. National Bank, 105 Ga., 116, 31 S. E. 141. Appellant is correct in the tentative proposition she advances that if the same had been made in Texas, payable in Chicago, and forwarded there, it would have been enforceable. Quite so. The case cited, Hager v. National Bank, supra, is the only case to the contrary, against the weight of authority in support thereof, of which we cite only three leading cases:

Pritchard v. Norton, 106 U. S. 124.

Milliken v. Pratt, 125 Mass. 374.

First Nat'l. Bank v. Mitchell, 92 Fed. 565.

Appellant (page 32, brief), cites Elliott on Contracts. The language obviously has no applicability to this case, as we have seen.

We have hitherto discussed Hayden v. Stone, 13 R. I. 1-06, cited again on p. 32, brief.

Appellant cites a number of cases intended to advance the idea that the State of Texas is loath to extend comity to other States in general. She starts out with the case of Sanger v. Jesse French P. & O. Co., 21 Tex. Civ. App. 523, and quotes a part of the opinion. This case involved the title to property situated in the State of Texas, with reference to which the State of Texas requires certain registration, etc. It is of course well settled that the law of the forum applies to matters and requirements relating to specific property situated therein. Although this point of law is not clearly brought out in the opinion, the intrinsic justice behind the law is what probably induced the court to decide the case the way it did.

In the case of Powell v. DeBlanc, 23 Tex. 66, which was decided in 1859, the court enforced the laws of Mississippi by virtue of which it was held that a certain right had vested in a husband as to the wife's slaves, even though the husband and wife moved to Louisiana before her death, in which State the laws of succession were different. The court, in its opinion, announced the dictum quoted by appellant.

The case of Railway Co. v. Richards, 68 Tex. 375 (p. 34, brief) involved a right of action founded on a tort—not an action on a contract. What was said by the court in that case can have no bearing on this case. The case of Ryan v. Railway (Supreme Court of Texas), 65 Tex. 13, correctly announces the doctrine with relation to contracts and shows that it is the policy of Texas to extend comity to other States. The conclusion which appellant attempts to draw therefrom (p. 35, brief), also falls.

The case of Building & Loan Ass'n. v. Griffin, 90

Tex. 480, involved a contract, which, though payable in South Dakota, was USURIOUS under the laws of Texas. Moreover, the contract was secured by a mortgage upon real estate situated in Texas. This case presents a beautiful example of a contract that might be considered "inherently harmful," "pernicious," "bad according to moral standards," as is so clearly defined in the opinion in International Harvester Co. v. McAdams, supra. A usurious contract is unquestionably "inherently harmful" according to moral standards, in the judgment of any court. This contract was so held in this case, and the decision turned upon this very point.

The case of Fowler v. Bell, 90 Tex. 150, as shown by appellant's discussion thereof, on p. 35 of brief, involved a mortgage on property situated in Texas, which by accepted principles of international law, as we have seen, is governed by the *lex fori*.

The citation of the case of Green v. Van Buskirk, 5 Wall. 307, as shown by appellant's discussion thereof, is subject to the same criticism (p. 36, brief).

The opinion in the case of Pritchard v. Norton, 106 U. S. 124 (U. S. Supreme Court), is a marvellous treatise on the general subject of *lex loci contractus, lex fori*, etc, and presents the elementary principles of this branch of the law in exact accordance with appellee's contentions. In the course of the opinion it was said that the case of Leroux v. Brown, 12 C. B. 801, held that a contract valid by the laws of the place where it is made, though not in writing, will not be enforced in the courts of a country where the statute of frauds prevails unless it is put in writing, **because**, since the laws of evi-

dence are a part of the remedy and thus governed by the *lex fori*, the contract could not be put in evidence according to the *lex fori*.

The case of Security Trust Co. v. Dodd, Mead & Co., 173 U. S. 624 (p. 36, brief) relates to assignments of property, which would, as we have seen, be governed by the *lex fori*. This case is not in point here.

We have already discussed the case of Thompson v. Taylor, 65 N. J. L. 107 (p. 36, brief).

Appellant seeks to minimize the leading case of Milliken v. Pratt, 125 Mass. 374.

What is the settled public policy and positive prohibition of a State? Let us turn to the first part of the opinion of Justice Gray in which he says:

"**The general rule is that the validity of a contract is to be determined by the laws of the State in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a State whose laws do not permit such a contract. Scudder v. Union National Bank, 91 U. S. 406. EVEN A CONTRACT EXPRESSLY PROHIBITED BY THE STATUTES OF THE STATE IN WHICH THE SUIT IS BROUGHT, if not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the State, as administered by its courts, will refuse to entertain an action on such a contract, made by ONE OF ITS CITIZENS abroad in a State the laws of which permit it. Greenwood v. Curtis, 6 Mass. 358; McIntyre v. Parks, 3 Metc. 207.**"

In this case the contract was enforced in the domicile of the married woman. The fact that the powers of married women had been enlarged in the State of the

domicile between the execution of the contract and the bringing of the suit was mentioned, as an additional fact of weight, but not as controlling the decision.

Away back in 1878, Justice Gray says:

"But it is not true at the present day that all civilized States recognize the absolute incapacity of married women to make contracts. The tendency of modern legislation is to enlarge their capacity in this respect and in many States they have nearly or quite the same powers as if unmarried."

APPELLEE'S FIRST COUNTER PROPOSITION.

The contract of guaranty was entered into by Mrs. Grosman in the State of Illinois to be performed in that State, and, under the settled rules of private international law, is a valid contract to be construed and enforced according to the laws of Illinois.

STATEMENT.

This proposition is beyond controversy since it is supported by the facts. Appellant also admits its correctness.

AUTHORITIES.

9 Cyc. 668.

Ryan & Co. v. M. K. & T. Ry. Co., 65 Tex. 13.

Pritchard v. Norton, 106 U. S. 124.

U. S. v. Garlinghouse, 25 Fed. Cas. No. 15189.

Story on Confl. of Laws, Sec. 242.

Merrielles v. State Bank of Keokuk, 5 C. A. 483 (Texas).

Gibson v. Sublett, 82 Ky. 596.

Taylor v. Sharp, 108 N. C. 377.

Wood v. Wheeler, 111 N. C. 231.

Robinson v. McQueen, 87 Tenn. 11 S. W. 38.

Milliken v. Pratt, 125 Mass. 374.

Hill v. Chase, 143 Mass. 129.

Baum v. Birchall, 24 Atl. 620.

Wright v. Remington, 41 N. J. Law, 48.

International Harvester Co. v. McAdam, 124 N. W. 1042.

Ross v. Ross, 129 Mass. 243.

Garrigue v. Kellar, 74 N. E. 523.

Baer Bros. v. Terry, 108 La. 597.

Young v. Hart, 101 Va. 480.

Young's Trustee v. Bullen, 19 Ky. La. Rep. 1561.

Bell v. Packard, 69 Me. 105.

Bowles v. Field (C. C.), 78 Fed. 742.

First Nat. Bank of Chicago v. Mitchell et al., 92 Fed. 565, 34 C. C. A. 542.

APPELLEE'S SECOND COUNTER PROPOSITION.

The Illinois statute authorizing a married woman to contract as a feme sole, makes Mrs. Grosman's contract valid there, and being valid there, it will be enforced in a Texas forum.

STATEMENT.

Grosman and his wife were in the city of Chicago together. Grosman secured from his wife the contract sued upon and presented the same, together with his own note, to the bank and thereupon the $25,000 was given him (42-44).

AUTHORITIES.

All cases cited under the first counter proposition:

And:

Hurd's Rev. Stats., 1911, Chap. 68 (Act. of 1874), Ill.

Phila. Savings Fund Society v. Chas. W. Lasher et al., 144 Ill. App. 653.

First National Bank of Chicago v. Mitchell (U. S. C. Ct. Appeals, Second Circuit), 92 Fed. 565.

Merreilles v. Bank, 5 Tex. Civ. App. 485.

Speer on the Law of Married Women in Texas, Sec. 315, p. 364.

Wharton Confl. Laws, Vol. 1, 3rd Ed. pp. 15-16.

Texas Married Women's Act of June 19, 1913.

ARGUMENT.

The general rule is that the validity of a contract is determined by the laws of the place where it is made or to be performed, and not by the laws of the respective domiciles of the contracting parties, nor of the forum in which the remedy is sought to be enforced.

"The parties by making their contract in a given country are held, in the absence of proof to the contrary, to have intended that it should be judged by the laws of that country; that is, by the *lex loci contractus*. Prima facie, the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly, to be performed in another country. In other words, the proper law of a country is the place where it is made."

9 Cyc. 668 and authorities cited thereunder.

It will be noted that the contract in question was entered into in the city of Chicago, Illinois, under cir-

cumstances raising a conclusive presumption that the parties intended it to be considered an Illinois contract.

Ryan & Co. v. M. K. & T. Ry. Co., 65 Tex. 13 (Supreme Court).

In addition to these facts, the obligation assumed by the defendant, Mrs. Grosman, was solvable in Illinois, at the plaintiff's banking institution in the city of Chicago; so that the seat of the obligation is decisively laid by the correlated doctrine of *lex loci solutionus*, or the place where the performance is to take place.

Where the contract is made in one country and is to be performed either wholly or partly in another, the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where performance is to take place, the *lex loci solutionus*. 9 Cyc. 669, and authorities cited thereunder.

Reference is especially made to the United States Supreme Court case of Pritchard v. Norton, 106 U. S. 124, for an able discussion of the respective doctrines of *lex loci contractus*, *lex loci solutionus*, and *lex fori* in relation to contracts. The head notes by Mr. Justice Matthews clearly state the law, as follows:

1. That the question of the validity of the bond, as dependent upon the sufficiency of its consideration, is not a matter of procedure and remedy, to be governed by the *lex fori*, but belongs to the substance of the contract, and must be determined by the law of the seat of the obligation.

2. In every forum a contract is governed by the law with a view to which it is made, because, by the consent of the parties, that law becomes a part of their agreement, and it is, therefore, to be presumed, in the ab-

sence of any express declaration or controlling circumstances to the contrary, that the parties had in contemplation a law according to which their contract would be upheld, rather than one by which it would be defeated.

3. The obligation of the bond of indemnity was, either to place funds in the hands of the obligee, wherewith to discharge his liability when it became fixed by judgment, or to refund to him his necessary advances in discharging it, in the place where his liability was legally solvable; and as this obligation could only be fulfilled in Louisiana, it must be governed by the law of that State as the *lex loci solutionus.*

Applying the general law more specifically to the question of the capacity of the parties to make a contract, we find:

The capacity of the parties to make a contract is, as a general rule, to be determined by the law of the place where the contract is entered into; as for example the enforceability of a bond made by a married woman • • • U. S. v. Garlinghouse, 25 Fed. Cas. No. 15,189, 4 Ben. 194, 9 Cyc. 671.

Having elaborately considered the authorities, Mr. Justice Story reaches the conclusion that

"Generally speaking, the validity of a contract is to be decided by the law of the place where it is made • • • If valid there, it is by the general law of nations—*jure gentium*—held valid everywhere, by the tacit or implied consent of the parties. The rule is founded, not merely in the convenience, but in the necessities of nations; for otherwise it would be impracticable for them to carry on an extensive intercourse and commerce with each other. The whole system of agencies, of pur-

chases and sales, of mutual credits, and of transfers of negotiable instruments, rests on this foundation. " Story, Confl. Laws, Sec. 242.

Elsewhere the same eminent author says:

"In regard to questions of minority and majority, competency or incompetency to marry, **incapacities incident to coverture**, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicile of birth or the law of any other acquired and fixed domicile, is **not** generally to govern, but the *lex loci contractus aut actus*—the law of the place where the contract is made or the act done." Id. 103.

Applying the general law still more specifically to contracts of married women made in jurisdictions where married women have the general power to contract and enforced in jurisdictions where they are under the disabilities of coverture as regards contracts, we find:

The Texas case of Merrielles v. State Bank of Keokuk, 5 C. A. 483, presenting an almost identical state of facts with the case at bar. In this case Mrs. Merrielles and her husband were joint makers on a note in the State of Iowa where a married woman has a general right to contract as a *feme sole*, her separate property being liable for her debts. Mrs. Merrielles owned some real property in Texas which was her separate property. Mr. Merrielles was insolvent. The Iowa bank attached Mrs. Merrielles' separate property in Texas and in the District Court obtained a judgment against her, together with a foreclosure of the attachment lien. Upon appeal to the Court of Civil Appeals for the Second District the judgment was affirmed, the court holding:

"Without undertaking an extended discussion of this question (whether the court erred in submitting to the jury the laws of Iowa to create a liability against the separate real estate of a married woman situated in Texas), we express the conclusion that the court correctly applied the law of Iowa, the *'lex loci contractus'* in the enforcement of the obligations in suit. This action, we think, was justified by the views of our Supreme Court in Ryan v. Railway, 65 Tex. 13 *et seq.*"

This case, therefore, must be dominated by the law of Illinois. That law, as we will see later, made Mrs. Grosman, so far as related to a contract both made and to be performed in Illinois, a feme sole to all intents and purposes. By that law, the feme defendant made a contract which, being valid where made, became *eo instanti*, valid everywhere and capable of being enforced in like manner as in the State of its origin. This contract bore with it, wherever taken, the stamp of the status, capacity and condition of the feme defendant conferred by the laws of that State; hence she is to be regarded, with reference to such contract, as a feme sole in this Sate, with full capabilities and liabilities as such, and with none of the disabilities incident to coverture in this State. This must be so, else the acknowledgment of the validity of the contract would be but a barren and idle ceremony, conferring no benefits and affording no remedy; because if, in this State, Mrs. Grosman be permitted to assert her coverture as a defense to such contract, she thereby overthrows the force and effect of the law under which this contract was made and to be performed. Mrs. Grosman, as to such contract, occupies

the attitude before this Court of a feme sole, suable as such in every point and particular, as if she were discovert. For this reason our laws do not apply and were not intended to apply, to such a case.

A number of well considered cases support the views here expressed. Thus in Kentucky a married woman is incapable of binding herself by contract, except in a limited way, as to necessaries; but yet in that State, a married woman and her husband, having executed jointly in the State of Louisiana a promissory note, where such contracts were valid, it was ruled that the payee of such instrument could maintain an action on such note in the State of Kentucky against the feme covert, recover a judgment against her as a feme sole, and subject her general property in that State to the payment of such judgment. Gibson v. Sublett, 82 Ky. 596. In that case, it was aptly and forcibly said, after referring to the principles announced by Story:

"If, then, the contract is to be held valid and binding here, because it is so in the State where it was made, it would seem to reasonably follow that her property here should be subject; for to hold that a valid and binding contract is not enforceable at any time, nor in any manner, is absurd * * In our opinion, whenever it is ascertained and determined, by judgment of court, that a contract made by a married woman in another State is valid and binding, as, according to the rule founded upon comity between the States, the contract in this case must be adjudged, the remedy provided for the satisfaction of judgments should be applied as though the judgment were against a feme sole or a married woman invested

with the rights and subject to the responsibilities of a feme sole."

In North Carolina a married woman is generally incapable of binding herself by contract, nor is there any method of procedure provided for recovering a personal judgment against her; but nevertheless, it has been held in that State that a promissory note executed by a married woman in the State of New York, where, by the act of 1884, she could contract as a feme sole, could be sued on in North Carolina, and such married woman being served with process in that State, a personal judgment could be rendered against her. Taylor v. Sharp, 108 N. C. 377, 13 S. E. 138. In a later instance in that State, where the note was executed by the feme covert in South Carolina and being there valid, it was ruled that a personal judgment could be rendered against her. Wood v. Wheeler, 111 N. C. 231, 16 S. E. 418. Both of these cases proceed upon the theory that, the contract being valid where made, that validity attends it and determines the status, condition and capacity of the maker, in the forum of another State, whose laws do not recognize the validity of such contracts, when made within the jurisdiction of such forum.

Another case of similar ruling is Robinson v. McQueen, 87 Tenn., 11 S. W. 38, in which the proceedings were instituted by attachment.

A very similar case to the case at bar is the leading case of Milliken v. Pratt, 125 Mass. 374, in which a married woman residing in Massachusetts, and by the statutes of that State at that time, incapable of contracting, made a written guaranty of her husband's debt, and the

instrument was forwarded and delivered in Maine, where such contracts were valid and binding, and where they could be enforced in the same manner "as if she were sole." In this case it will be noticed that the contract in question is a married woman's written guaranty of her husband's debt and that it was held to be a Maine contract.

See also Evans v. Cleary, 125 Pa. St. 204; 17 Atl. 440. In this case the proceedings were instituted by attachment.

Hill v. Chase, 143 Mass., 129, 9 N. E. 30.

Baum v. Birchall (Pa. Sup.), 24 Atl. 620.

Wright v. Remington, 41 N. J. Law, 48, involves a contract made in Illinois, and enforced in New Jersey. In this case it was held that an ordinary action might be maintained against a married woman alone on a contract made by her in Illinois, where she was capable of contracting as if unmarried, notwithstanding there was no such statute in New Jersey, and that the enforcement of such a contract in New Jersey was not repugnant to the general interests of the citizens nor to the policy of that State.

From these authorities the rule is readily deducible that, although the *lex fori* must apply as to the remedy, yet it belongs to the *lex loci contractus* to interpret the contract, ascertain its validity, the nature of its obligations, the capacity and status of the contracting parties; and having done this, the *lex fori* applies the remedy **in accordance with the legal status of the party sued, as previously determined by the law of the place of the contract.** Thus, if a feme covert is sued in a jurisdiction where she is incapable of contracting, on a contract exe-

cuted in a country where she is capable, she will be treated and dealt with as a feme sole.

Illinois Statute.

The provisions of the Illinois statutes pertinent to this question are as follows:

Sec. 6. Contracts may be made and liabilities incurred by a wife and the same enforced against her, to the same extent and in the same manner as if she were unmarried; but except with the consent of her husband, she may not enter into or carry on any partnership business, unless her husband has abandoned or deserted her, or is idiotic or insane or is confined to the penitentiary.

Sec. 5. That a married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried and an attachment or judgment in such action may be enforced by or against her as if she were a single woman.

Sec. 9. A married woman may own, in her own right, real and personal property obtained by descent, gift or purchase, and manage, sell and convey the same, to the same extent and in the same manner that the husband can property belonging to him (proviso relating to transfers of goods and chattels between husband and wife).

Hurd's Rev. Stats. 1911, Chapter 68 (Act of 1874).

Thus it will be seen that, according to the law of Illinois a married woman has conferred upon her practically all the rights and responsibilities of a feme sole, and practically all her common law disabilities of coverture have been removed.

In the case of Philadelphia Savings Fund Society v. Chas. W. Lasher et al., 144 Ill. App. 653, a married wom-

an's general powers to contract, and to sue and be sued are recognized. Since 1874 in Illinois the general law on this question is so well recognized and settled, that it is not questioned in the courts.

An extremely interesting case in the United States Circuit Court of Appeals for the Second Circuit, in this connection, is the case of First National Bank of Chicago v. Mitchell et al., decided Mar. 1, 1899, 92 Fed. 565, and which involved a married woman's Illinois contract. The facts are very similar to the facts in the case at bar, only stronger. In that case a married woman, residing in Conn., under the laws of which State she could not execute a contract of surety, there executed a contract of guaranty addressed to a Chicago bank in order to enable her husband to procure credit at the bank, and delivered the same to her husband, who mailed it to the Chicago bank.

The court says:

"The question in the case is whether a guaranty payable in the State of Illinois, and delivered to the plaintiff there, signed by a married woman, at her domicile, in Connecticut, to enable her husband to procure credit with the plaintiff, delivered by her to her husband, and sent by him by mail to the plaintiff, is a valid contract; she being disqualified by the law of Connecticut from making a contract as surety, and authorized to do so by the laws of Illinois. In other words, the question is whether the incapacity to contract by the law of the State of a person's domicile attaches to his contractual act in another State, where the disability has been removed * * * The previous authorities are collated in Milliken v. Pratt, 125 Mass., 374, and the opinion deliv-

ered is such a complete exposition of them that other references are unnecessary. That judgment determines the precise question presented in this case. In that case the plaintiffs sued, in Massachusetts, a married woman, domiciled there, who had signed a guaranty for her husband, intended to be used by him to obtain credit with the plaintiffs at Portland, Me. She delivered it to her husband at her home in Massachusetts, and he mailed it there to the plaintiffs, in Portland, and the plaintiffs received it in Portland shortly after. By the law of Massachusetts at the time, a married woman was incapacitated to make such a contract. By the law of Maine, she was not. The court decided that the contract was made in Maine, and controlled by the law of that State; that, as regarded the capacity of the defendants, its validity depended upon the law of that State; and that, as the law of Maine authorized a married woman to bind herself by such contract, it was a valid contract, and the plaintiffs were entitled to recover.

"A case exactly coincident in its facts with the present case and with Milliken v. Pratt, is Bell v. Packard, 69 Me. 105, except that, instead of signing a guaranty, the defendant in that case signed a note as surety for her husband. The court decided that the note was a Maine contract and obligatory upon the defendant.

"These adjudications proceed upon the considerations that the instrument was not effective for any purpose until delivered to the party whose benefit it was prepared, that the place where it became operative was the place where the contract mas made, and that the disqualification of the married woman in the State of her domicile did not accompany her in making a contract

in a State where the disqualification had been removed. They are a consistent and logical application of that fundamental and most important rule of private international law, that a contract valid by the law of the place where it is made is valid everywhere."

We have shown beyond question, and all decisions concur in this, that Mrs. Grosman's contract of guaranty in question was an Illinois contract and a valid contract. The vast majority of the cases, including the later cases, as we have shown, hold, logically and consistently, that a valid and binding contract of a married woman in one State is enforceable in any State. There is, however, a small minority of older cases holding, in effect, that a married woman may make a valid contract in a foreign State, but when it comes to enforcing it in her own State, **if the policy of the forum is repugnant to the idea of a married woman making such a contract,** it may not be enforced therein.

As we have shown heretofore, particularly in the discussion of the opinion in International Harvester Co. v. McAdam, supra, such a theory is not well reasoned, it is only advanced in a small minority of the older cases, and it is not the law or policy of our own State, Texas, as shown in the case of Merreilles v. Bank, supra, and Ryan v. Railway, supra.

There is nothing in the policy of the forum of Texas which prohibits the enforcement of the remedy sought against a married woman. A married woman is a proper juristic person in the courts of Texas, and it has long been the law that a valid personal judgment may be had against her. Outside of debts incurred in foreign jurisdictions, she may be sued in Texas on her ante-nuptial

debts and for her torts, and valid personal judgments rendered against her. A married woman in Texas, even before our law of 1913, into which we will go later, is very far removed from common-law disability, and there is nothing in our public policy to conflict with the subjecting of her separate estate in this State to the satisfaction of debts legally incurred. Speer on the Law of Married Women in Texas, Sec. 315, p. 364.

Our public policy, as ably shown by Wharton on Confl. of Laws, Vol. 1, 3rd Ed. pp. 15 and 16, is a very different thing from the law of the forum. Inter. Harvester Co. v. McAdam, supra, and Milliken v. Pratt, supra.

All this without taking into account the Texas Married Woman's Law, which became effective June 19, 1913, or nearly a year before the date of Mrs. Grosman's contract of guaranty sued on. This law gives a married woman general power to contract, authorizes suits on such contracts, and provides that her separate property and such community property as is made up by the personal earnings of the wife and the income, rents and revenues of her separate property, shall be subject to the payment of debts contracted by her. When the debts are contracted for necessaries, the husband's separarate and community property is made additionally liable as under the old law.

First let us consider the preamble and emergency clauses of the 1913 Act, supra, as follows:

"An Act to amend Articles 4621, 4622 and 4624, Title 68, Chapter 3, of the Revised Statutes of Texas, 1911, concerning the marital rights of parties, defining separate and community property of the husband and

wife, **conferring upon the wife the power to make contracts, authorizing suits on such contracts,** giving the wife control over her separate property, placing limitations upon such control, giving her, etc., etc."

And the emergency clause, as follows:

"The fact that the present law denies to married women the right to manage their separate property **and to make contracts** is unjust to a large number of citizens of this State, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, etc."

Next notice the language of the Act itself. In Article 4621, it is said: "The separate property of the husband shall not be subject to the **debts contracted by the wife,** either before or after **marriage,** except for necessaries furnished herself and children after her marriage with him."

Then in Article 4624: "Neither the separate property of the husband, nor community property other than the personal earnings of the wife, the income, rents and revenues from her separate property, shall be subject to the payment of **debts contracted by the wife,** except those contracted for necessaries furnished her or her children; provided, the wife shall never be the joint maker of a note or a surety on any obligation **of another** without the joinder of her husband with her in making such contract."

Although the language of the above Article is negative in expression, it nevertheless, by necessary construction, confers upon the wife the power to make contracts, authorizes suits thereon, and subjects her separate property and her portion of the community property

to the payment of debts so contracted.

It is clear from a survey of the law before this Act, the intention of the legislature as expressed in the preamble and emergency clauses, and the language of the Act itself, that the general power to contract, with the rights and liabilities necessarily flowing therefrom, is conferred on married women in Texas. Appellant concedes this general proposition on page 19 of her brief.

In the proviso clause of the above Act, general power to become surety on the obligation of another is given, though only with the joinder of the husband. In the case at issue, she becomes the surety on the obligation of her husband, and not on that "of another," and it seems a reasonable interpretation of this law, as applied to the case at bar, that in such an instance the concurrent execution of the note and guaranty would constitute the joinder of the husband. If the Court would not hold to such a construction of the language of this proviso, there is at least nothing prohibitive of the particular contract in question therein, nor any restriction of her general power to contract as elsewhere conferred in the statute, and as applied to the contract in question.

It will thus be seen that very probably, if Mrs. Grosman had executed the contract in question in Texas, with a Texas bank, it would be held, under our 1913 law, valid, binding, and enforceable against her separate property. However, since there can be no question but that the contract in question is a valid Illinois contract, the 1913 law applies only in shaping, broadening and fixing the policy of the forum over what it was, as we have seen, prior to the passage of this law, and has peculiar significance in further distinguishing this case from that

minor class of cases, heretofore referred to, in which it has been held that a policy of the forum **repugnant** to the enforcing of a remedy against a married woman, has been held controlling.

So far from there being a "positive prohibition of statute" in Texas, our law, as above shown, expressly confers upon married women the power to contract and to charge their separate property. Even before this law the policy and spirit of the forum was in accord with the remedy sought here, as shown in Merreilles v. Bank, supra, and in the general tendency of the law, as shown in Speer, but since 1913, before the contract in question was executed, the law of the forum is substantially the same as the law of Illinois, so far as this case is concerned.

APPELLEE'S THIRD COUNTER PROPOSITION.

Mrs. Grosman's contract is not repugnant to the settled policy of the State of Texas, nor is it prohibited by her laws.

AUTHORITIES.

Act of 1913, Secs. 4621, 4622, 4624, Vernon Sayles' Texas Civil Statutes, 1914.

Speer on the Law of Married Women in Texas, Sec. 315.

International Harvester Co. v. McAdam, 124 N. W. 1042.

Greenhood on Public Policy, p. 46.

I W. & P. 407.

Commerce Cotton Oil Co. v. Camp, 145 S. W. 902.

Williams v. Coca Cola Co., 150 S. W. 759.

Preble v. Baldwin, 6 Cush. (Mass.) 549.

Eastwood v. Kenyon, 11 Ad. & El. 438.

Building & Loan Assn. v. Griffin, 90 Tex. 480.

Milliken v. Pratt, 125 Mass. 374.

Wharton Confl. Laws, 3rd. Ed., Vol. 2, p. 910.

Bray v. Clapp et al, 80 Me. 277.

Brightman v. Comanche County, 94 Tex. 599.

Schroeder v. Turner, 68 Md. 506.

Waggoner v. Flack, 92 Tex. 633.

Warner Elevator Co. v. Houston, 28 S. W. 405.

Farmers' etc. Nat. Bank., 96 Tex. 331.

Phipps v. Willis, 32 S. W. 801.

Tooke v. Taylor, 31 Tex. 1.

Republic v. Skidmore, 2 Tex. 261, 267.

Vogelsang Bros. v. Mensing & Bros., 1 App. Civ. Cases, Sec. 1164.

Higgins v. Rinker, 47 Tex. 393.

Dublin Cotton Oil Co. v. Robinson, 50 S. W. 1054.

Wallace v. Stevens, 74 Tex. 559.

Roberts v. Yarboro, 41 Tex. 449, and

All the other cases cited under appellee's first and second counter propositions.

ARGUMENT.

It is perhaps unnecessary to present any argument in support of this proposition since the proposition is negatively established, in the first part of this brief, by a consideration of appellant's argument and authorities presented to support the converse thereof. I believe, that so much has been said upon the question of the public policy of Texas, that anything further here would be unnecessary repetition.

Perhaps it would be well to add a few words in the affirmative in relation to the proviso of the Act of 1913,

reading: "The wife shall never be a joint maker of a note or a surety on any bond of obligation **of another** without the joinder of **her husband** with her in making such contract," which appellant claims is a positive prohibition of law covering the contract in question.

This proviso comes at the end of the Act and constitutes a limitation upon the general power of contract conferred in the body of the Act. Its meaning is plain and simple. It means that the wife shall not become surety for a third party without the joinder of her husband. The uses of the phrases "of another" and "her husband" in the same clause and within four words of each other makes this construction of the proviso the necessary and only one. In Warner v. Houston, 28 S. W. 405 (Texas), it was held that the words "other person" following an enumeration of certain classes of persons in a statute always means others than those enumerated. Taking into consideration the fact that before this law the wife had no power to contract, even joined by her husband except for necessaries and for the benefit of her separate property, the necessary implication that she **does** have the capacity to become surety on the bond or obligation of **her husband** becomes significant and inescapable. "That which is implied in a statute is as much a part of it as what is expressed." Higgins v. Rinker, 47 Tex. 393. The Texas legislature did not intend to provide a limiting clause attached to nothing. The very proviso imports the right to become a surety on the obligation of anyone that does not come within the terms of the limitation and that someone is "her husband" and no other. It would be ridiculous, anyway, to hold that a person's joint contractor, who, as principal, enters into

a contract jointly with his surety, would be required to technically "join" by signing his name on the same sheet of paper with his surety. He is already a joint contractor. Is that not a sufficient joinder? What possible advantage would be derived by requiring anything further? Another signature would be a mere technicality and would add nothing to the substance of the joint undertaking of the husband and wife.

The case of Republic v. Skidmore, 2 Tex. 261, 267, holds that an exception strengthens the force of the law in cases not excepted, in connection with construing a statute. Thus the right of a married woman to become a surety on the obligation of her husband is fixed and emphasized by the very proviso which limits her power to become a surety on the obligation "of another."

Then, again, where a general rule has been established by a statute containing exceptions, courts will not curtail the rule or add to the exceptions by implication. Wallace v. Stevens, 74 Tex. 559. Roberts v. Yarboro, 41 Tex. 449.

We have seen that the Act of 1913 confers upon married women the general power to contract. We have quoted the preamble of the Act. "The preamble of a statute may be referred to as an aid to its construction." Walraven v. Farmers', etc. Nat. Bank, 96 Tex. 331. We have quoted the emergency clause, or section 2 of the Act. "The emergency clause of a statute may be resorted to for determining its purpose and application by reference to the necessity there declared." Waggoner v. Flack, 92 Tex. 633. Brightman v. Comanche County, 94 Tex. 599.

CONCLUSION.

In the effort to deal fairly with the Court, and spread as far as possible all of the cases upon which appellant seems to rely, and which, in my judgment, seem to support appellee's position, this brief is drawn to, perhaps, tiresome proportions; but, inasmuch as the trial court refused to permit the repudiation of a valid contract, and decreed that the return of money which was apparently secured in good faith involved nothing pernicious or immoral, it is thought that this court will pardon the lack of brevity.

In the face of strides that are being made for the betterment of the condition of the women of the United States, as evidenced by the progressive legislation throughout the country, it is astounding that it should now be sought to have the courts close their eyes to this movement and re-shackle, with the old common-law inhibitions, our married women.

We answer (a) The contract was valid where made and there is no public policy in the State of the forum preventing its recognition as such; and (b) the court correctly ruled the cause at *nisi prius*.

Affirmance is respectfully prayed.

WILLIAM H. ATWELL,
Solicitor for Appellee,
Union Trust Company.

FILED
FEB 21 1916
JAMES D. MAHER
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No. 8 [redacted] 106

IN THE

Supreme Court of the United States

October Term, 1915.

UNION TRUST COMPANY,
Petitioner,

vs.

MINNIE KAHN GROSSMAN, et al.,
Respondents.

The petition of Union Trust Company for a certiorari to be directed to the United States Circuit Court of Appeals for the Fifth Circuit to bring before this Honorable Court Case No. 2831, there pending, entitled Minnie Kahn Grossman, et al, Appellants, v. Union Trust Company, Appellee.

WILLIAM HAWLEY ATWELL,
Solicitor for Union Trust Company,
Petitioner.

W. M. Warlick, Law P., 519½ Main St., Dallas, Phone M. 4921.

IN THE

Supreme Court of the United States

October Term, 1915.

UNION TRUST COMPANY,

Petitioner,

vs.

MINNIE KAHN GROSMAN, et al.,

Respondents.

The petition of Union Trust Company for a certiorari to be directed to the United States Circuit Court of Appeals for the Fifth Circuit to bring before this Honorable Court Case No. 2831, there pending, entitled Minnie Kahn Grosman, et al., Appellants, v. Union Trust Company, Appellee.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Union Trust Company, respectfully represents:

1. That petitioner is a resident and citizen of Chi-

cago, State of Illinois, engaged in the banking business, and has so been for many years. That on May 23, 1914, Hiram Grosman and his wife, Minnie Kahn Grosman, who were in Chicago together, entered into negotiations with this petitioner for a loan of $25,000.00. Hiram Grosman's note and security were unsatisfactory to the petitioner. Hiram Grosman thereupon offered to give his wife as surety, in addition to the other security. Mrs. Grosman was at that time a resident of the State of Texas and owned considerable realty there. This arrangement was satisfactory to the petitioner and Mrs. Grosman executed a guaranty or suretyship contract, by the terms of which she made herself a surety for the debt of $25,000.00, so made.

Some months after Mrs. Grosman's return to her home in Texas and after default in the payment of the borrowed money, suit was brought against her and against her husband's firm and against the individuals composing it, on the contracts so executed.

At the time of the institution of the suit, a writ of attachment was issued and levied upon real estate in the City of Dallas, Texas, which was Mrs. Grosman's separate property.

Mrs. Grosman pleaded coverture and raised the question of the right of the plaintiff to have enforced, by the court, the contract which she had executed in the State of Illinois.

The trial court held that she was liable on her con-

tract and gave the plaintiff, this petitioner, judgment for its said debt against Mrs. Grosman and ordered the foreclosure of the lien.

2. The statutes of Illinois were introduced, showing that at the time of the making of the contract by Mr. and Mrs. Grosman to the bank for the borrowed money, she, Mrs. Grosman, though a married woman, could lawfully enter into such a contract, and that the said contract was in fact valid in the State of Illinois where made and where to be performed.

3. Mrs. Grosman appealed to the United States Circuit Court of Appeals for the Fifth Circuit and on January 4, 1916, that court, in a written opinion, reversed the judgment of the lower court and held that Mrs. Grosman was not liable on her Illinois contract.

4. The decision is final and settles the controversy so far as the trial court is concerned, because under the opinion of the Circuit Court of Appeals, the trial court would be compelled to enter judgment for Mrs. Grosman.

5. The decision is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of First National Bank of Chicago v. Mitchell, 92 Fed. 565, where it was held that a married woman in Connecticut, executing and delivering to her husband there a guaranty to enable him to obtain credit from an Illinois bank, in Illinois, to whom the husband sent it by mail, such contract was to be gov-

erned by the Illinois law and was therefore binding on her although she was incapacitated from making such a contract by the laws of Connecticut, the State of her residence.

6. The legal questions are these:

(a) A contract valid where executed is valid everywhere.

(b) A contract valid under the laws of Illinois will be hospitably received and enforced in the State of Texas, even though the same contract could not have been made in the State of Texas.

(c) There being no well defined or settled public policy in a State of the Union where a contract is sought to be enforced, against its enforcement, such contract being valid in another State of the Union where it was entered into, is valid in the first State by reason of comity.

(d) A contract being valid in the State in which executed, will, by reason of commercial and legal necessity, in the absence of some immorality or viciousness or injustice, be held to be valid in another State of the Union though by the laws of such State it could not have been validly entered into there.

BRIEF AND AUTHORITIES.

7. A contract of guaranty was entered into by Mrs. Grosman in the State of Illinois to be performed in that State and is therefore a valid contract, to be construed and enforced, according to the laws of Illinois.

Pritchard v. Norton, 106 U. S. 124.

First National Bank of Chicago v. Mitchell, 92 Fed. 565; 34 C. C. A. 542.

Bowles v. Field, 78 Fed. 742.

Ryan & Co. v. M. K. & T. Ry. Co., 65 Tex. 13.

Merreilles v. State Bank of Keokuk, 5 Tex. Civ. App. 483.

Bell v. Packard, 69 Me. 105.

Milliken v. Pratt, 125 Mass. 374.

International Harvester Co. v. McAdams, 124 N. W. 1042.

Hill v. Chase, 143 Mass. 129.

Baum v. Birchall, 24 Atl. 620.

Ross v. Ross, 129 Mass. 243.

Gibson v. Sublett, 82 Ky. 596.

Taylor v. Sharp, 108 N. C. 377; 13 S. E. 138.

Wood v. Wheeler, 111 N. C. 231; 16 S. E. 418.

Robinson v. McQueen, 87 Tenn., 11 S. W. 38.

Wright v. Remington, 41 N. J. L. 48.

Garrigue v. Kellar, 74 N. E. 523.

Baer Bros. v. Terry, 108 La. 597.

Young v. Hart, 101 Va. 480.

Young's Trustee v. Bullen, 19 Ky. L. R. 1561.

U. S. v. Garlinhouse, 25 Fed. Cas. 15189.

Story Con. Law. Par. 242.

9 Cyc. 668.

8. The Illinois statute authorized a married woman to contract as a feme sole, and Mrs. Grosman's contract

was valid there, and if valid there it will be enforced in a Texas forum.

Hurd's Revised Statutes, 1911, Chapter 68, Act 1874, Illinois.

First National Bank of Chicago v. Mitchell, 92 Fed. 565; 34 C. C. A. 542.

Bowles v. Field, 78 Fed. 742.

Merreilles v. State Bank of Keokuk, 5 Tex. Civ. App. 483.

Milliken v. Pratt, 125 Mass. 374.

Baum v. Birchall, 24 Atl. 620.

Bell v. Packard, 69 Me. 105.

Philadelphia Savings Fund Society v. Chas. W. Lasher, et al., 144 Ill. App. 653.

Speer—Law of Married Women in Texas, Par. 315, p. 364.

Wharton Confl. Laws, Vol. 1, 3rd Ed. pp. 15-16.

Texas Married Woman's Act of June 19, 1913.

Authorities cited under foregoing proposition.

9. It is the policy of Texas to extend comity.

Ryan & Co. v. M. K. & T. Ry. Co., 65 Tex. 13.

Merreilles v. State Bank of Keokuk, 5 Tex. Civ. App. 483.

Speer on Law of Married Women in Texas, Par. 315, p. 364.

10. There is no exception to the general proposition that a contract valid where executed will be valid and

enforced in any other nation, even as to nations separated by the seas, save that a contract would not be enforced in the latter nation if there were a well defined and settled public policy against such a contract, and "public policy" as here understood, and as preventing such enforcement, means that the contract to be refused validity, must be vicious or unjust or immoral.

Cuba R. R. Co. v. Crosby, 222 U. S. 473.

The Kensington, 183 U. S. 263.

International Harvester Co. v. McAdams, 124 N. W. 1042.

11. Mrs. Grosman's contract is not repugnant to the settled policy of the State of Texas.

Preamble and emergency clause, Act of 1913, relating to Husband and Wife, General Laws 33rd Legislature, pp. 61-62, Texas.

Speer on Law of Married Women in Texas, Sec. 315.

Merreilles v. State Bank of Keokuk, 5 Tex. Civ. App. 483.

STATEMENT.

12. An examination of the statutes of the State of Texas discloses that from time to time a married woman's power to contract and a married woman's rights over her property have been enlarged, until in 1913 the Legislature announced in its latest revision of these Statutes, in a preamble and an emergency clause, as follows:

"An act to amend Articles 4621, 4622 and 4624, Title 68, Chapter 3 of the Revised Statutes of Texas, 1911, concerning the marital rights of parties, defining separate and community property of the husband and wife, conferring upon the wife the power to make contracts, authorizing suits on such contracts, giving the wife control over her separate property, placing limitations upon such control, giving her * * *"

And in the emergency clause the following language:

"The fact that the present law denies to married women the right to manage their separate property and to make contracts is unjust to a large number of citizens of this State, creates an emergency and an imperative public necessity, that the constitutional rule requiring bills to be read on three days be suspended * * *"

In the case of Merreilles v. State Bank, by a Texas Court of Appeals, a married woman's contract, valid under the laws of Iowa and invalid under the laws of Texas, was enforced by the courts of Texas, and her real estate, situated in the State of Texas, was taken from her for its fulfillment.

In Ryan v. M. K. & T., 65 Tex. 13, the Supreme Court of Texas upheld a contract, valid under the laws of Missouri, where made, and invalid in Texas where sought to be enforced.

It is inconceivable that any mind, judicial or lay, could conclude that a contract made by a Texas married woman in the State of Illinois, by virtue of which a citizen of Illinois parted with $25,000.00 in cash, for

the benefit of the married woman and her husband, was against the public policy of Texas, and therefore unenforceable in a Texas court, since the very highest evidence of individual righteousness is the payment of an honest debt. There is nothing to corrupt the morals of the Texas people, nor to work an injustice to the Texas people, nor to display immorality before the Texas people, in the payment of a debt which one of its Texas people has made with and to a trusting citizen in a sister State.

13. There is forwarded herewith as an exhibit hereto a certified copy of the record in the above cause, including the proceedings in the said Circuit Court of Appeals, as well as the opinion of said court and the briefs of counsel.

14. The said decision of the United States Circuit Court of Appeals, in refusing the enforcement of the contract given to this petitioner for its money, is in direct and irreconcilable conflict with the decisions of this court heretofore cited, and in direct and irreconcilable conflict with the decision of the Circuit Court of Appeals for the Second Circuit heretofore cited, and with the decisions of the Supreme Court and of the Court of Appeals of the State of Texas heretofore cited, and the question involved is of such grave and general importance that this Court should exercise its jurisdiction to bring up the record by certiorari, to the end that uniformity of decision may be maintained, and that

there may not be different rules among the States and circuits of the Union of the United States in the construction and enforcement of contracts of married women.

15. Your petitioner believes that the aforesaid ruling and judgment of the said Circuit Court of Appeals was erroneous and ought to be reversed, and that this Honorable Court should require the said case to be certified to it for review and determination in conformity with the provisions of the Act of Congress in such cases made and provided.

16. WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in the case therein numbered 2831, and entitled Minnie Kahn Grosman, et al., appellants, v. Union Trust Company, appellee; to the end that said cause may be reviewed and determined by this Court as provided by Section 240 of the Act of Congress entitled: "An Act to codify, revise and amend the laws relating to the judiciary, approved March 3, 1911, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and in conformity

with said Act, and that the said orders and judgment of the said United States Circuit Court of Appeals in the said cause, and every part thereof, may be reversed by this Honorable Court. And your petitioner will ever pray.

WILLIAM HAWLEY ATWELL,
Solicitor for Petitioner.

STATE OF TEXAS
County of Dallas

William Hawley Atwell, being duly sworn, says that he is counsel for the Union Trust Company, petitioner in the foregoing petition; that he prepared the foregoing petition; and that the allegations thereof are true, as he verily believes.

WILLIAM HAWLEY ATWELL.

Subscribed and sworn to before me, by the said William Hawley Atwell, on this the 19th day of January, A. D. 1916.

L. B. AVEILHE,
Notary Public, Dallas County, Texas.

I, William Hawley Atwell, attorney and counselor-at-law, admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing petition for a writ of certiorari; that the same is not made for the purpose of delay and that, in my opinion, the said petition is meritorious and well

founded in law, and ought to be granted and the writ issued.

WILLIAM HAWLEY ATWELL,
Solicitor for Union Trust Company,
Petitioner.

THE SUPREME COURT OF THE UNITED STATES

October Term, 1915.

UNION TRUST COMPANY,

Petitioner,

vs.

MINNIE KAHN GROSMAN, et al.,

Respondents.

Comes now Union Trust Company, by its undersigned attorney, and moves this Honorable Court to require, by writ of certiorari or other proper process, directed to the Honorable, The Justices of the United States Circuit Court of Appeals for the Fifth Circuit, the said court to certify to this court for its review and determination a certain cause in said Court of Appeals pending, wherein petitioner was appellee, and Minnie Kahn Grosman, et al., were appellants, and to that end now presents herewith his petition, with a certified copy of the entire record, in said cause, as it is, in said Circuit Court of Appeals.

WILLIAM HAWLEY ATWELL,
Solicitor for Union Trust Company,
Petitioner.

NOTICE OF APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MINNIE KAHN GROSMAN, et al.,
Appellants,

vs.

UNION TRUST COMPANY,
Appellee.

The appellants are hereby notified that the appellee will, on Monday, February 21, 1916, upon his verified petition, and a copy of the entire record in this cause, at the opening of court on that date, or as soon thereafter as counsel can be heard, submit a motion, a copy of which and of the petition for a writ of certiorari, as above set forth, are herewith delivered to you, to the Supreme Court of the United States, at its court room in the Capitol in the City of Washington, D. C.

WILLIAM HAWLEY ATWELL,
Solicitor for Union Trust Company,
Petitioner.

Service of the foregoing notice and delivery of a copy of the said motion and petition for writ of cer-

tiorari on the 17th day of January, A. D. 1916, is hereby acknowledged.

FRANCIS MARION ETHERIDGE,
JOHN MANSON McCORMICK,
HENRI LOUIE BROMBERG,
Solicitors for Minnie Kahn Grosman, et al.,
Appellants, Respondents.

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Office Supreme Court, U. S.
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FEB 21 1916
JAMES D. MAHER
CLERK

No. 387 106

IN THE

Supreme Court of the United States

UNION TRUST COMPANY, PETITIONER

V.

MINNIE KAHN GROSMAN, ET AL., RESPONDENT

BRIEF OF RESPONDENT MINNIE KAHN GROSMAN IN OPPOSITION TO THE PRAYER OF PETITIONER FOR A WRIT OF CERTIORARI.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Attorneys for MINNIE KAHN GROSMAN,
Respondent.

No._____

IN THE

Supreme Court of the United States

UNION TRUST COMPANY, PETITIONER

V.

MINNIE KAHN GROSMAN, ET AL., RESPONDENT

BRIEF OF RESPONDENT MINNIE KAHN GROSMAN IN OPPOSITION TO THE PRAYER OF PETITIONER FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The decision of the Circuit Court of Appeals herein does not conflict with the decision in First National Bank of Chicago v. Mitchell, et al., 92 Fed. 565, because (a) what was therein said upon the question at issue was *obiter* in that the sole question therein and upon which that case was

ultimately decided was that of *res adjudicata*, Mitchell v. First National Bank of Chicago, 180 U. S. 471; (b) the statute of Connecticut did not prohibit the courts from enforcing the unauthorized contract, whereas Article 4625, R. S. of Texas 1911 does in effect prohibit the enforcement by the courts of a married woman's contract unless it be made to appear that same was made within the sphere of her contractual power, and that it was "reasonable and proper".

The decision of the Circuit Court of Appeals herein does not conflict with the decision in Ryan v. M. K. & T. Ry. Co., 65 Tex. 13, in that the contract therein was not prohibited by the laws of Texas, as the Act of 1863, Article 708, R. S. of Texas 1911, prohibiting carriers from limiting their liability as it existed at common law, was expressly limited to such carriers as were **"within this state"**, whereas the contract involved in that case was not made by a carrier **"within this state"** but by a carrier without the state, whose contract was to be and was performed partly without and partly within the state; hence, in that case no question of comity was either involved or discussed.

The decision of the Circuit Court of Appeals herein is not in conflict with the decision of the intermediate Texas appellate court in Merrielles v. State Bank of Keokuk, 5 Tex. Civ. App. 483, because Mrs. Merrielles **was never a citizen of Texas** and her domicile and the *locus contractus* coincided, and therefore, no element of the public policy of Texas was involved.

The decision of the Circuit Court of Appeals herein is confined to a construction of the local laws of Texas, and therefore, the question involved is not "of such grave and general importance that this court should exercise its jurisdiction to bring up the record by certiorari."

The laws of Texas forbids the contract made the basis of the suit and enjoins upon the courts the duty of refusing to enforce it.

AUTHORITIES.

Articles 4621, 4622, 4624 and 4625, Vernon's Sayles' Texas Civil Stats. 1914;
Cruger v. McCracken, 87 Tex. 534;
Noel v. Clark, 60 S. W. (Tex.) 356;
Stroter v. Brackenridge, 102 Tex. 386;
Flannery v. Chidgey, 77 S. W. (Tex.) 1034;
Kellett v. Trice, 95 Tex. 160, 168;
Wadkins v. Watson, 86 Tex. 194;
Milliken v. Pratt, 125, Mass. 374, 383;
Harvard Publishing Co. v. Benjamin, 84 Md. 333;
Building & Loan Assn. v. Griffin, 90 Tex., 480, 490;
Ruhe v. Buck, 124 Mo., 178, 188, 189.

ARGUMENT.

The warrant for Mrs. Grosman's personal liability must be found in the statute and not elsewhere. (Stroter v. Brackenridge, above cited). The statute defines and limits the authority of married women to contract, and "the authority so granted is strictly construed, and no appeal to the equitable

powers of the court can be made to bind the wife by her contracts not executed under the provisions of the statute." (Flannery v. Chidgey, above cited). "It is settled by the decisions" in Texas "that married women have no power **except such as is affirmatively given by statute, to bind themselves personally by contracts"**, and **"the policy of the law protects the wife's property from liability for her husband's debts"** (Kellett v. Trice, above cited). Section 1 of the Act of 1913, now constituting Article 4624 Vernon's Sayles' Texas Civil Stats. 1914, provides that **"the wife shall never be * * * a surety on any bond or obligation of another without the joinder of her husband with her in making such contract."** The purported surety contract of Mrs. Grosman made the basis of the action was entered into by her **alone.** She was not joined therein by her husband. His verbal assent goes for nothing. (Harvard Pub. Co. v. Benjamin, above cited).

The power of the wife to contract **alone** is prescribed by Article 4622, which is expressly limited to her personal earnings, the rents from her real estate, the interest on bonds and notes, and the dividends on stocks owned by her. Contracting **alone** the wife, therefore, according to the settled rule of construction in Texas is manifestly prohibited from involving **the corpus** of her estate; and contracting **alone** the wife cannot enter into a surety contract; **nor can she become a surety for her husband for the reason that the statute** (Art. 4624) **requires that she shall not enter into any surety contract except she have the protection of the disinterested, concurring judgment of the husband.** This she cannot have if she attempt

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to become a surety for her husband. Upon the contrary, in such case, she is subjected to the antagonistic influence of her husband.

Article 4625, quoted in the opinion of the Circuit Court of Appeals, was neither repealed nor amended by the Act of 1913, from which it follows that that article and Articles 4621, 4622 and 4624, as amended by the Act of 1913, must be construed *in pari materia* and be given "concurrent efficacy." If the words "preceding article," as employed in Article 4625, be made to read "preceding **articles**", as is both permissible and necessary, then the obvious object and purpose of Article 4625 is to enjoin upon the courts of Texas the duty in every case in which a married woman is sought to be rendered liable by her contract to be satisfied that the debt contracted was for one of **"the purposes enumerated"** in the statute, and, further, **"that the debts so contracted or expenses so incurred were reasonable and proper".**

The prohibition of the Texas statute is therefore obviously dual in character. It not only prohibits the execution of the contract made the basis of the action, but it enjoins upon the courts the duty of refusing to enforce it.

There exists, therefore, no room for the exercise of comity in favor of the repugnant Illinois law, and that law is wholly dependent for enforcement in Texas upon the principle of comity, as *ex proprio vigore* it has no extra-territorial force and effect. (Milliken v. Pratt, above cited). "The doctrine of comity between the States and between independent governments does not require that any State or government shall enforce laws of another State or the rights claimed by citizens

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of other States, or contracts to be performed in other States, which are so contrary to the laws of the State in which they are sought to be enforced as to work an injury and injustice to the people of the latter State or government, or a serious interference with its own policy or laws". (Building & Loan Ass'n v. Griffin, above cited).

It must be conceded that had respondent's purported surety contract been made under the identical circumstances in Texas with a citizen of Texas no recovery could be had thereon in any of the courts of Texas. It is a strange anomaly to hold that a contract made by a married woman in Texas with a citizen of Texas would not be enforced by our courts while the same contract, because made by the married woman whilst upon a visit to Chicago, is nevertheless valid and enforcible in the Texas courts. Such an anomaly involves such rank injustice to and such unwarranted discrimination against the citizens of Texas as to render its existence intolerable. **"Is this state required, out of a spirit of comity, to award a non-resident a remedy at war with our own policy, and one which she constantly denies to her own citizens"?** The obvious answer is "no". (Ruhe v. Buck, above cited).

We, therefore, respectfully submit that the prayer of the petitioner should be denied.

Frances Marion Etheridge

Joseph Mawson McCormick

Attorneys for MINNIE KAHN GROSMAN,
Respondent.

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No. 387.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

UNION TRUST COMPANY, Petitioner,

v.

MINNIE KAHN GROSMAN ET AL., Respondents.

BRIEF FOR RESPONDENT, MINNIE KAHN GROSMAN.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for MINNIE KAHN GROSMAN, Respondent.

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No. 387.

IN THE SUPREME COURT OF THE UNITED STATES.

UNION TRUST COMPANY, Petitioner,

v.

MINNIE KAHN GROSMAN ET AL., Respondents.

BRIEF FOR RESPONDENT, MINNIE KAHN GROSMAN.

STATEMENT.

Respondent, continuously a resident and citizen of Texas since her birth, accompanied her husband, also a resident and citizen of Texas, on a visit to Chicago. While there respondent's husband entered into negotiations with petitioner for a loan to the firm of Hiram Grosman & Co., a co-partnership composed of Hiram Grosman and his brother, Mose. Respondent neither sought the loan nor did she participate in any of the

negotiations therefor. However, pending the negotiations her husband asked her to sign, and she did sign a contract of guaranty which had been prepared by petitioner, and she delivered it to her husband who in turn delivered it to petitioner. Respondent's husband did not join her in the execution of the contract of guaranty. She executed it **alone** and **wholly without consideration to herself.** Petitioner, through its Vice President, Wheeler, knew that respondent was a married woman; that she was a citizen of Texas; that what property she had was in Texas, and also knew that her husband was a resident citizen of Texas. Respondent labors under the disability of coverture, her disability never having been removed. (Rec. 30 and 31). Petitioner's statements, pp. 1 and 4 of its brief, to the effect that respondent "went with her husband to petitioner's place of business and sought a $25,000 loan" and that "they approached petitioner to secure the loan" and "entered into negotiations with the petitioner for a loan of $25,000" are contrary to the facts.

POINT I.

The Texas statute prohibits respondent from becoming surety for her husband.

POINT II.

The Texas statute forbids the enforcement of respondent's prohibited contract of suretyship for her husband.

POINT III.

The statute of Illinois authorizing a married woman to become surety for her husband and to sue and be sued without the joinder of her husband cannot be given force and effect in Texas upon the principle of comity, because the laws of Texas prohibit respondent's surety contract and forbid its enforcement.

AUTHORITIES.

Rev. St. of Tex. 1911, Arts. 1840, 4624, 4625, 5492; 2 Gammel's Laws of Texas, 177 to 180; 3 Gammel's Laws of Texas, 77 to 79; 3 Vern. Sayles' St. 1914, Art. 4629a to 4629d; Kavanaugh v. Brown, 1 Tex. 481; Powell v. DeBlane, 26 Tex. 66; Harris v. Williams, 44 Tex. 124; Railway Co. v. Richards, 68 Tex. 375; Wadkins v. Watson, 86 Tex. 194; Kruger v. McCracken, 87 Tex. 584; Red River Nat. Bank v. Ferguson, 192 S. W. (Tex. Civ. App.), 1088; Fowler v. Bell, 90 Tex. 150; Building & Loan Ass'n. v. Griffin, 90 Tex. 480; Stroter v. Brackenridge, 102 Tex. 386; Sanger v. Jesse French P. & O. Co., 21 Tex. Civ. App. 523; Noel v. Clark, 60 S. W. 356; Flannery v. Chidgey, 77 S. W. 1034; Lemons v. Biddy, 149 S. W. 1065; Baer v. Terry, 105 La. 479; Ruhe v. Buck, 124 Mo. 178; Hager v. National Bank, 105 Ga. 116; Bank of Louisiana v. Williams, 46 Miss. 618; Brown v. Dalton, 105 Ky. 669; Armstrong v. Best, 112 N. C. 59; Hanover Nat.

Bank v. Howell, 118 N. C. 271; Milliken v. Pratt, 125 Mass. 374; Spearman v. Ward, 114 Pa. 634; Thompson v. Taylor, 65 N. J. L. 107; Hayden v. Stone, 13 R. I. 106; Palmer v. Palmer, 26 Utah 31; 5 R. C. L. 911 and 912; Pritchard v. Norton, 106 U. S. 124; Thompson v. Morrow, 147 U. S. 706.

ARGUMENT.

The statute of Illinois provides that "Contracts may be made and liabilities incurred by a wife, and the same enforced against her, to the same extent and in the same manner as if she were unmarried" and that she "may in all cases, sue and be sued without joining her husband with her," Jones & A. Ill. St. Anno., paragraphs 6143 and 6138. That statute has no extraterritorial effect and its enforcement in Texas depends purely upon comity, and the laws of Texas are such as leave no room for the exercise of comity. Since Jan. 26, 1840, the common law, subject to constitutional and statutory modification, has been in force in Texas and governs the marital relation. Art. 5492 Rev. St. of Tex. 1911. At common law the wife could not bind herself by any contract. Kavanaugh v. Brown, 1 Tex. 481; Wadkins v. Watson, 86 Tex. 194. The Act, approved Jan. 20, 1840, governing marital rights, adopted the common law, defined the community estate and the separate estates of the spouses,

but conferred no contractual power whatever upon the wife. 2 Gammel's Laws of Tex. 177 to 180, bottom paging. Contractual power was conferred upon married women for the first time in Texas by the Act approved March 13, 1848. 3 Gammel's Laws of Tex. 77-79, bottom paging. Section 4 of that Act provided "that the husband and wife may be jointly sued for all debts contracted by the wife for necessaries furnished herself or children, and for all expenses which may have been incurred by the wife for the benefit of her separate property," and section 5 provided "that upon the trial of any suit as provided for in the fourth section of this Act **if it shall appear to the satisfaction of the court and jury, that the debts so contracted, or expenses so incurred, were for the purposes enumerated in said section; and also that the debts so contracted or expenses so incurred, were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife, at the discretion of the plaintiff.**" Sections 4 and 5 of that Act, with immaterial changes in phraseology, were carried through all revisions and now constitute Articles 1840, 4624 and 4625, Rev. St. of Tex. 1911. Such was the state of the Texas law from 1840 to the Act approved Mar. 13, 1911, Articles 4629a to 4629d inclusive, 3 Vernon's Sayles' Tex. Civ. St. 1914, relating to the removal of disabilities of

married women, which has no application, because respondent's disabilities were never removed. (Rec. 30.) The settled construction is that the statute **impliedly prohibits** what it does not **expressly permit,** and, in order to obtain a judgment against a married woman in a Texas court, it must be pleaded and proved that her contract sought to be enforced was one she was authorized by the statute to make, and was "reasonable and proper". The statute prohibits the contract made the basis of this action and forbids its enforcement. In Kruger v. McCracken, 87 Tex. 584, McCracken recovered judgment against Kruger in the District Court and Kruger sued out a writ of error to the Court of Civil Appeals, his wife being one of the sureties on his supersedeas writ of error bond. The Court of Civil Appeals affirmed the judgment of the District Court and rendered judgment against the sureties, including Mrs. Kruger, on the writ of error bond. Kruger applied to the Supreme Court for a writ of error but his application was refused. When the Court of Civil Appeals rendered judgment against Mrs. Kruger, one of the sureties, the fact that she was a married woman did not appear of record. After Kruger's application to the Supreme Court for a writ of error had been refused, Mrs. Kruger filed a motion in the Court of Civil Appeals to set aside the judgment as to her on the ground that at the time she signed the

supersedeas bond she was a married woman and the wife of J. P. Kruger. The motion was supported by affidavits. The Court of Civil Appeals dismissed her motion and she applied to the Supreme Court for a writ of error which was granted. The Supreme Court held that the motion of Mrs. Kruger in the Court of Civil Appeals raised a jurisdictional question and that that court had the power to hear affidavits or other evidence in support of the motion and to determine the issue. In the course of the opinion the Chief Justice said: **"The execution of the bond by Mrs. Kruger being a nullity, it follows that the Court of Civil Appeals did not acquire by said execution jurisdiction to render judgment against her."** This ruling obviously was on the ground that the statute not only prohibited Mrs. Kruger from becoming surety for her husband but denied the courts the power to extend any remedy whatsoever for the enforcement of such prohibited contract. The jurisdiction in this case was founded solely upon diverse citizenship and the rights of the parties must be adjudicated as would a Texas court adjudicate them according to the laws of Texas. Pritchard v. Norton, 106 U. S. 124, 129.

The statute requires the pleading and proof in an action against a married woman to show affirmatively that the contract sought to be enforced was reasonable and proper and one she was **authorized under the statute**

to make, and by necessary implication prohibits the enforcement of an unauthorized contract. Harris v. Williams, 44 Tex. 124; Flannery v. Chidgey, 77 S. W. (Tex. Civ. App.) 1034; Lemons v. Biddy, 149 S. W. (Tex. Civ. App.) 1065; Thompson v. Morrow, 147 S. W. (Tex. Civ. App.) 706; Noel v. Clark, 60 S. W. (Tex. Civ. App.) 356, 359; Stroter v. Brackenridge, 102 Tex. 386; Red River Nat. Bank v. Ferguson, 192 S. W. (Tex. Civ. App.) 1088.

"The principle of comity cannot be invoked to enforce the laws of a foreign state which are inimical to the interests of the State where their enforcement is sought. Nor will a contract executed in one State be enforced in another if it is in contravention of the public policy of the latter State. Comity between different States requires no State to uphold or enforce contracts which injuriously affect the welfare of its subjects, **or contravene its own laws, institutions or policy.** In such cases when the *lex loci contractus* comes in conflict with the *lex fori*, comity must yield to the positive law and policy of the forum." Palmer v. Palmer, 26 Utah 31. The uniform current of Texas decisions is to the effect that the Texas courts will not, and under the statute cannot, enforce an unauthorized or an unreasonable contract of a married woman. Ryan v. M. K. & T. Ry., 65 Tex. 13, and Merielles v. State Bank of Keokuk, 5 Tex. Civ. App. 483, afford no excep-

tion. In the Ryan case, the contract was not prohibited by the laws of Texas. Art. 708 Rev. St. of Tex. 1911 prohibiting carriers from limiting their liability as it existed at common law, is expressly limited to such carriers as are **"within this State,"** whereas the contract involved in that case was made by a carrier **without** the State whose contract was to be, and was, performed partly without and partly within the State. No statute of Texas withheld a remedy and no question of comity was either involved or discussed in that case. In the Merielles case, Mrs. Merielles **owned property in but was never a citizen of Texas**, and her domicile and the *locus contractus* coincided. "The plaintiffs and the defendants and the payees of the notes all resided at Keokuk, Iowa, at and before the execution of the notes, the bringing of the suit, and the rendition on May 22, 1891, of the judgment." The law of Texas, prohibiting a wife from binding herself for the debts of her husband, precludes recovery against her. "That law is satisfied, and its whole object and purpose accomplished, when" Texas "wives are protected against binding themselves for the debts of their husbands. This protection is not extended to" Iowa "wives, and, if these bind themselves in the State of their domicile for the debts of their husbands, they cannot be permitted to come to this State to be divorced from their obligations." Baer v. Terry, 105 La.

479. The language of the Supreme Court of Louisiana, thus paraphrased, also disposes of International Harvester Co. v. McAdam, 142 Wis. 114, relied on by petitioner, wherein a married woman, a citizen of South Dakota, contracted an obligation valid in that State and subsequently removed to Wisconsin where she was sued thereon, and the obligation was properly enforced. In such cases the contract, unless *contra bonos mores*, is enforcible. Here no such element is requisite. The Merielles case was decided by two of the three judges of an intermediate appellate court. It did not find its way to the Supreme Court, nor, except as to an immaterial question of practice, has it been cited by any Texas court. The Merielles case rests on the principle that the public policy of Texas applies **only** for the protection of citizens of that state. Kaufman v. Kaufman, 163 N. Y. Supp. 566, 568. The contract sought to be enforced here is obnoxious to the *lex domicilii*, and therefore, comity will not be extended. Ruhe v. Buck, 124 Mo. 178; Armstrong v. Best, 112 N. C. 59; Hanover National Bank v. Howell, 118 N. C. 271; Spearman v. Ward, 114 Pa. 634; Hayden v. Stone, 13 R. I. 106; Bank of Louisiana v. Williams, 46 Miss. 618; Thompson v. Taylor, 65 N. J. L. 107; Brown v. Dalton, 105 Ky. 669; Milliken v. Pratt, 125 Mass. 374; Hager v. National Bank, 105 Ga. 116. The Texas courts

have discussed the comity rule in the following cases: Sanger v. Jesse French P. & O. Co., 21 Tex. Civ. App. 523, 526; Powell v. De Blane, 26 Tex. 66, 76; Railway Co. v. Richards, 68 Tex. 375, 378 and 379; Building & Loan Ass'n. v. Griffin, 90 Tex. 480, 490; Fowler v. Bell, 90 Tex. 150. In Sanger v. Jesse French P. & O. Co., *supra*, the court said: "The law of comity is not permitted to operate within a State to the prejudice of its government, in opposition to its settled policy, or the interests of its citizens." Had respondent's contract been made in Texas with a citizen of Texas, under the identical circumstances accompanying its execution in Chicago, no recovery in any of the courts of Texas could be had thereon. Red River Nat. Bank v. Ferguson, 192 S. W. 1088. It is a strange anomaly to hold that a contract made by a married woman in Texas would not be enforced by our courts while the same contract, because made while she was on a visit in Chicago, is valid and enforcible. Such an anomaly involves rank injustice to, and such unwarranted discrimination against, the citizens of Texas as renders its existence intolerable. If respondent's purported obligation is enforcible, it follows that had she made the same in Texas payable in Chicago and forwarded it there it would also have been enforcible, whereas the law is to the contrary. Hager v. National Bank, 105 Ga. 116. Petitioner has no equities to invoke.

It knew that respondent was a married woman; that she was a citizen of Texas; that what property she had was in Texas, and that, under Pennoyer v. Neff, it could not obtain in the courts of Illinois a valid judgment against her upon substituted service and that in the event its purported obligation had to be enforced by suit it would have to resort to the Texas courts, in which event it would encounter adverse enactments. In Powell v. De Blane, *supra*, the Chief Justice said that "it is a principle of international law, that no State is bound to give effect within its territory to the laws of another State or government when to do so would be to contravene its own policy and laws, or to affect injuriously the rights of its own citizens." In Railway Co. v. Richards, *supra*, the court refused to permit the operation of a statute of Louisiana on the ground that the right thereby accorded was denied at common law and was not secured by the constitution or statutes of Texas. In the course of the opinion, pp. 378 and 379, the court said: "We know of no rule of law which would authorize a court of this State to give effect to the laws of another State conferring such right as is claimed in this case, **when the laws of this State declare that the same facts, transpiring here, as are made the basis of appellee's claim, could confer no right whatever to the relief sought.** The most liberal State comity cannot, in reference to such a question as that before us,

require one State to enforce the laws of another when in conflict with its own law." In Building & Loan Ass'n. v. Griffin, *supra*, p. 490, the court said: "But this doctrine of comity between the States and between independent governments does not require that any state or government shall enforce the laws of another state or the rights claimed by citizens of other states, or contracts to be performed in other states, which are so contrary to the laws of the state in which they are sought to be enforced, as to work an injury and injustice to the people of the latter state or government, or a serious interference with its own policy or laws." To enforce the contract made the basis of this action is to render the statute of Texas a dead letter. Thompson v. Taylor, 65 N. J. L. 107. It is unmistakably clear that the Texas law up to the passage of the Act approved March 21, 1913, prohibited the purported contract and its enforcement. It remains to consider the effect of the Act approved March 21, 1913, hence

POINT IV.

The Act approved March 21, 1913, prohibits a married woman from becoming surety for her husband.

POINT V.

The Act approved March 21, 1913, did not either expressly or impliedly repeal Article 4625 of the Revised Statutes of Texas of 1911.

AUTHORITIES.

Articles 3965, 4621, 4622, 4624 and 4625 Rev. St. of Tex. 1911; Preamble of Act approved Mar. 21, 1913, 16 Gammel's Laws of Texas (Gen. Laws 33 Leg.) 61; Enacting Clause of Act approved Mar. 21, 1913, 16 Gammel's Laws of Texas (Gen. Laws 33 Leg.) 61; Emergency Clause of Act approved Mar. 21, 1913, 16 Gammel's Laws of Texas (Gen. Laws 33 Leg.) 61; Kavanaugh v. Brown, 1 Tex. 481, 484; Red River Nat. Bank v. Ferguson, 192 S. W. 1088; M. K. & T. Ry. Co. v. Mahaffey, 105 Tex. 394, 397; De Vires v. Conklin, 22 Mich. 225; Conrad v. Nall, 24 Mich. 275; People v. Circuit Judge, 37 Mich. 287; Farrell v. State, 54 N. J. L. 421; Allen v. Beebe, 63 N. J. L. 377; Chamberlain v. Chamberlain, 43 N. Y. 424, 439; Harvard Publishing Co. v. Benjamin, 84 Md. 333; Powell v. Kempton Park Racecourse Co., 2 L. R. Q. B. Div. (1897) 242, 266; Beal, Cardinal Rules of Legal Interp., 2 ed. 248; Black, Interp. of Laws, 172 and 173; End. Interp. St. sec. 294; Lewis' Suth. Stat. Constr. sec. 183; 1 Lewis' Suth. Stat. Constr. 2 ed. 444; 488; 2 Lewis' Suth. Stat. Constr. 2 ed. 909; 1310; Potter, Dwar. St. p. 189.

ARGUMENT.

Petitioner's brief, p. 22, quotes a **part** but not **all** of the preamble. The preamble is as follows:

"An Act to amend Articles 4621, 4622 and 4624, Title 68, Chapter 3, of the Revised Statutes of Texas, 1911, concerning the marital rights of parties, defining separate and community property of the husband and wife, conferring upon the wife, the power to make contracts, **authorizing suit on such contracts**, giving the wife control over her separate property, placing limitations upon such control, giving her control over the rents from her separate real estate, interest on bonds and notes, and dividends on stock owned by her, and over her personal earnings, exempting the same from debts contracted by the husband, providing that the joinder of the husband shall be necessary to a conveyance or encumbrance of the wife's lands, bonds and stocks, except that upon the order of the district court she may convey the same without the joinder of her husband, **repealing Article 4625, Title 68, Chapter 3, of the Revised Statutes of 1911, and all other laws and parts of laws in conflict herewith**, and declaring an emergency."

From the preamble it appears that the author of the bill proposed to empower the wife to make contracts, to authorize suit thereon and to repeal Article 4625 which denies a remedy on unauthorized or unreasonable con-

tracts of married women. Presumably the bill was originally drawn to correspond with the preamble, but it clearly appears from the **enactment** that the Legislature repudiated the design of the author and **refused to repeal Article 4625.** The enacting clause is unambiguous. It is as follows:

> "Be it enacted by the Legislature of the State of Texas:
>
> "Section 1. That Article 4621, 4622, and 4624, Title 68, Chapter 3, of the Revised Statutes of Texas, 1911, be amended so as to hereafter read as follows:"

The emergency clause, being section 2 of the Act, is unimportant in that it failed and the Act did not take effect until 90 days after adjournment.

The Act in explicit terms was limited to an **amendment** of Articles 4621, 4622 and 4624. **It contains no express repeal** and cannot be held to repeal Article 4625 by necessary implication. It is simply the case of a law being amended in part, which means that the unamended and amended portions must be read **in pari materia,** that is, as if the Act had been originally passed as amended. It is true that in construing an Act the caption must be **considered,** (M. K. & T. Ry. Co. v. Mahaffey, 105 Tex. 394, 397), but the caption, whilst aiding words of doubtful import in the body of an Act, cannot be made to overcome the clear and unambiguous enacting clause. "The title of the Act and the preamble are, strictly speaking,

not parts of it. It is true they may assist in removing ambiguities where the intent is not plain, but **where the words of the enacting clause are clear and positive, recourse must not be had to either of them.** It follows, therefore, that the title to the statutes cannot be used to extend or restrain any of the provisions contained in the body of the act." Black, Interp. of Laws, 172 & 173. The title "cannot be used to control the express provisions of an act." Cardinal Rules of Legal Interp., Beal, 2 ed., 248. "The rule is that, when the words of an enactment are clear, the preamble is to be disregarded, but, when the words are equivocal, effect is to be given to it to the extent that it shows what the Legislature are intending, and, if general language is used in the enactment which it is clear must have been intended to have some limitation upon it, the preamble may be used to indicate to what particular instances the enactment is intended to apply." Powell v. Kempton Park Racecourse Co., 2 L. R. Q. B. Div. (1897) 242, 266. The tradition and policy of the laws of Texas, as evidenced by enactments and decisions of her courts, have been that no contract will be enforced against a married woman unless it be shown that such contract is **authorized by the statute** and is **"reasonable and proper". "The courts ought not to impute an intent to the legislature, not clearly expressed, in direct hostility to the tradition and policy**

of the past." Chamberlain v. Chamberlain, 43 N. Y. 424, 439. To impute to the Legislature of Texas an intent to repeal Article 4625, continuously the law, an expression of the public policy of the state, for sixty-five years prior to the enactment of 1913, would be to do violence to the unbroken tradition and policy of the state, to the clear and unambiguous language of the enacting clause of the Act of 1913, and to settled rules of construction. "It is a general rule, however, that an amended statute is construed, as regards any action had after the amendment was made, as if the statute had been originally enacted in the amended form. 'The effect of an amendment to a section of the law is not to sever it from its relation to other sections of the law, but to give it operation in its new form as if it had been so drawn originally, treating the whole act as a harmonious entirety, with its several sections and parts mutually acting upon each other.' " 1 Lewis' Suth. Stat. Constr., 2 ed., 444. "When there is no express repeal none is presumed to be intended; and the effect of a new statute in conjunction with other statutes, with reference to established institutions, systems and policies, is always in view." 2 Lewis' Suth. Stat. Constr., 2 ed., 909. Speer, in his work on the Law of Marital Rights in Texas, in footnote 14 under section 499, says: "Vernon's Sayles' Tex. Civ. St. Art. 4625, **now repealed.**" That *ipse dixit*

is based solely on the fact that the title to the Act of March 21, 1913, recites that it repeals Article 4625, and a misconception of the law that a repeal results if recited in the title, notwithstanding the clear and positive enactment is to the contrary. The title reflects the views of the author of a bill and is drawn conformably to the bill as proposed by its author. Presumably the bill which resulted in the Act approved March 21, 1913, as originally introduced, embodied proposed enactmennts which were rejected, one of them being a repeal of Article 4625. Vernon's Sayles' Statutes, compiled in 1914, **embodies** Articles 4621, 4622 and 4624 as **amended** by the Act of 1913, and **retains** Article 4625 as being **unrepealed** and in force. The remedy prescribed by Article 4625 is exclusive. "Where a statute accords a new right or imposes a new duty or liability, unknown to the common law, and at the same time gives a remedy for its enforcement, the remedy so prescribed is exclusive." 2 Lewis' Suth. Stat. Constr., 2 ed., 1310. Article 4621, Rev. St. of 1911, defines the separate property of the spouses and provides that "during the marriage the husband shall have the sole management of all such property." Article 4622 defines community property and Article 4624 provides that the wife may contract debts for necessaries furnished herself or children and for all expenses which may have been incurred by her for the benefit of her separate property. These Articles were amended by the Act of 1913, and Article 4621, as amended, retains the definition, as it was aforetime, of the separate prop-

erty of the spouses. The husband is given **absolute** control over his separate property and the wife is given a **limited** control over the **corpus** of her separate property. She cannot convey or encumber her real estate except by the joinder of her husband and her privy acknowledgment—a judicial act—as required by existing law. She cannot transfer her stock and bonds except by the joint signature of her husband. Article 4621, as amended, does not purport to confer any contractual power whatsoever upon the wife contracting **alone.** Her power to contract **alone** is prescribed by Article 4622, as amended, **which limits her contractual power to the disposition of her personal earnings, the rents from her real estate, the interest on her bonds and notes and dividends on her stocks.** The wife contracting **alone** cannot involve any property other than her personal earnings, the rents from her real estate, the dividends on her bonds and stocks and the interest on her notes. This statutory provision in the light of the settled rule of construction constitutes a statutory prohibition against the power of the wife, contracting **alone,** to jeopardize the **corpus** of her estate. Article 4624, as amended, provides that "the wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract." The wife, by Article 4624 as amended, is ex-

pressly prohibited from becoming surety of **"another"** without the joinder of her husband in the contract of suretyship. The legislative wisdom, mindful of the hazard of suretyship and of the lack of experience of married women previously unaccustomed to any sort of business, expressed in the Act, obviously experimental in its nature, a clear intention to hedge about the contractual power of the married woman in such a way as to shield her from the vicissitudes incident to ill advised and disastrous contracts of suretyship. The Act, therefore, required, as a condition precedent to the wife's incurring the hazard of suretyship, that she have the disinterested, concurring judgment of her husband and that he join her in any such contract, whereby he would subject the community estate to the hazard of liability. This necessarily prohibits the wife from becoming surety for her husband. The disabilities which operated unjustly and oppressively on married women in Texas were that they were deprived of the control and disposition of their personal earnings and the increment of their separate property, and the manifest object and purpose of the Act of 1913 was to afford them relief in that respect, but it was not the design of that Act to subject the **corpus** of her property to dissipation by unauthorized and improvident contracts of suretyship. De Vires v. Conklin, 22 Mich. 225. In that case the court said: "The

disabilities are removed only so far as they operated unjustly and oppressively; beyond that they are suffered to remain. Even though removed in a beneficent design to protect the wife in the enjoyment and disposal of her property for the benefit of herself and family, the statute cannot be extended by construction to acts not expressed by its language nor within its design." It is clear that the wife necessarily is **prohibited** from becoming surety for her husband. Were it otherwise the beneficent design of the statute in requiring that the wife, in becoming surety for another should have the independent, unselfish and concurring judgment of the husband, would be thwarted. As far back as the first Texas, our Supreme Court said what is pertinent here: "It is not likely that she could resist the importunity of her husband to join with him in a contract and preserve that domestic harmony so vitally essential to the happiness of husband and wife. **The law wisely removes the temptation by putting it out of the power of both.**" Kavanaugh v. Brown, 1 Tex. 481, 484. Red River Nat. Bank v. Ferguson, 192 S. W. 1088, in which a rehearing was denied on Feb. 15, 1917, is the only Texas case which construes the Act of 1913, and it is therein distinctly held that the Act prohibits the wife from becoming a surety for her husband, and that case distinctly decides that a contract of suretyship by the wife for her husband will not be enforced. The

spirit and intent, rather than the letter, constitute the law. Article 4625, interpreted according to its spirit, purpose and intent, means that in every case in which the liability of a married woman is sought to be enforced relief must be denied unless it be shown both by pleading and proof that the contract upon which the liability is based was one she had the express power under the statute to make. "Where the later statute merely extends the power or right to new subjects, though without mentioning the limitations applicable to the subjects to which the early law referred, they may, by construction, be held to attach to the new subjects, when found consonant to the manifest intention of the legislature, or when such construction accords with its uniform policy." 1 Lewis' Suth. Stat. Constr. 488. If the words: 'preceding **article,**' as empoyed in Article 4625, be read, as under the settled rule of construction it should be, as: 'preceding **articles,**' the statute harmonizes and operates as if originally passed in its amended form. The construction of Article 4625, as contended for by respondent, is consonant to the manifest intention of the legislature which expressly rejected the proposal of the author of the bill, which resulted in the Act of 1913, to repeal it. Such construction accords with the uniform policy of the state as indisputably evidenced by enactments and decisions. It treats "the whole Act as a harmonious entirety, with its sev-

eral sections and parts mutually acting upon each other." 1 Lewis' Suth. Stat. Constr. 444. In Farrell v. State, 54 N. J. L. 421, the court said: " 'It is an established rule of law that all Acts *in pari materia*, are to be taken together, as if they were one law.' Potter, Dwar. St. p. 189. All consistent statutes, which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively and construed together, as though they constituted one Act. Lewis' Suth. Stat. Constr. sec. 183. As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended. People v. Circuit Judge, 37 Mich. 287. In Conrad v. Nall, 24 Mich. 275, a section in a chapter of the Code was amended, and **it was held that it was not intended to operate independently of the other provisions of the chapter, but that the whole chapter in its present form must be read as one Act.** The rule is correctly stated in End. Interp. St. sec. 294 as follows: 'A statute which is amended is thereafter, as to all acts subsequently done, to be construed as if the amendment had always been there; **and the amendment itself so thoroughly becomes a part of the original statute that it must be construed in view of the original statute as it stands after the amendments are introduced, and the matter superseded**

by the amendment eliminated.' " The legislative design must be viewed through the lens of the indisputable fact that married women, like minors, have been from time immemorial wards of the Texas courts, and the spirit and all pervading reason of the law, as expressed in Article 4625, is that in no instance shall a Texas court apply a remedy for the enforcement of a prohibited contract of a married woman. We respectfully submit that this case does not involve a question of general law. It involves only the construction and application of the local law of Texas. That law prohibits the contract made the basis of the action. It does more. It prohibits the enforcement of that contract. There exists, therefore, no room for the exercise of comity in aid of the Illinois law, and the Circuit Court of Appeals was correct in so holding, and it is respectfully submitted that the decree of the Circuit Court of Appeals should be here in all things affirmed.

Respectfully submitted,

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JOSEPH MANSON McCORMICK,
Solicitors for MINNIE KAHN GROSMAN, Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 106.

UNION TRUST COMPANY, PETITIONER,

vs.

MINNIE KAHN GROSMAN ET AL., RESPONDENTS.

SUPPLEMENTAL BRIEF FOR RESPONDENT, SUPPLYING ADDITIONAL STATUTES AND AUTHORITIES.

FRANCIS MARION ETHERIDGE,
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(25,145)

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Article 1840. The husband and wife shall be jointly sued for all debts contracted by the wife for necessaries furnished herself or children, and for all expenses which may have been incurred by the wife for the benefit of her separate property (act March 13, 1848).

Article 1841. The husband and wife shall also be jointly sued for all separate debts and demands against the wife, but in such case no personal judgment shall be rendered against the husband (act March 13, 1848).

Revised Civil Statutes of Texas of 1911.

Before it was amended in 1913, article 4624 read:

The wife may contract debts for necessaries furnished herself or children, and for all expenses which may have been incurred by the wife for the benefit of her separate property; and for such debts suit may be brought in the manner prescribed in article 1840 (act March 13, 1848).

Vernon's Sayles' Annotated Civil Statutes of the State of Texas, 1914, title 68, husband and wife, chapter 3, rights of married women:

"Article 4621. All property, both real and personal, of the husband owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessaries furnished herself and children after her marriage with him. All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired shall be the separate property of the wife. During marriage the husband shall have the sole management, control, and disposition of his separate property, both real and personal, and the wife shall have the sole management, control, and disposition of her separate property, both real and personal; provided, however, the joinder of the husband in the manner now provided by law for conveyance of the separate real estate of the wife shall be necessary to an encumbrance or conveyance by the wife of her lands and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her or of which she may be given control by this act; provided, also, that if the husband shall refuse to join in such encumbrance, or conveyance, or transfer of such property the wife may apply to the district court of the county of her residence, and it shall be the duty of the court, in term time or vacation, upon satisfactory proof that such en-

cumbrance, conveyance, or transfer would be advantageous to the interest of the wife, to make an order granting her permission to make such encumbrance, conveyance, or transfer without the joinder of her husband, in which event she may encumber, convey, or transfer said property without such joinder. Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings shall be subject to the payment of debts contracted by the husband. The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint conveyance of both the husband and the wife" (act March 13, 1848; P. D., 4641; Const., art. 16, sec. 15; acts 1913, p. 61, sec. 1, amending art. 4621, Rev. St., 1911).

"Art. 4622. All property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only, provided, however, the personal earnings of the wife, the rents from the wife's real estate, the interest on bonds and notes belonging to her and dividends on stocks owned by her shall be under the control, management, and disposition of the wife alone, subject to the provisions of article 4621, as hereinabove written; and further provided, that any funds on deposit in any bank or banking institution, whether in the name of the husband or the wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account" (acts 1913, p. 61, sec. 1).

"Art. 4623. All the effects which the husband and wife possess at the time the marriage may be dissolved shall be

regarded as common effects or gains, unless the contrary be satisfactorily proved" (acts Jan. 20, 1840; P. D., 4638).

"Art. 4624. Neither the separate property of the husband nor the community property other than the personal earnings of the wife and the income, rents, and revenues from her separate property shall be subject to the payments of debts contracted by the wife, except those contracted for necessaries furnished her or her children; provided, the wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract" (act March 13, 1848; P. D., 4643; acts 1913, p. 61, sec. 1, amending art. 4624, Rev. St., 1911).

"Art. 4625. Upon the trial of any suit as provided for in the preceding article, if it shall appear to the satisfaction of the court and jury that the debts so contracted or expenses so incurred were for the purposes enumerated in said article, and also that the debts so contracted or expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife, at the discretion of the plaintiff" (P. D., 4644).

"Art. 4626. Should the husband fail or refuse to support his wife from the proceeds of the lands she may have, or fail to educate her children as the fortune of the wife would justify, she may, in either case, complain to the county court, which, upon satisfactory proof, shall decree that so much of such proceeds shall be paid to the wife for the support of herself and for the nurture and education of her children, as the court may deem necessary" (act Jan. 20, 1840; P. D., 4637).

"Art. 4627. The community property of the husband and wife shall be liable for their debts contracted during marriage, except in such cases as are specially excepted by law" (act Aug. 26, 1856).

"Art. 4628. Every female under the age of twenty-one

years, who shall marry in accordance with the laws of this State, shall, from and after the time of such marriage, be deemed to be of full age, and shall have all the rights and privileges to which she would have been entitled had she been at the time of her marriage of full age" (act March 13, 1848; P. D., 4642).

"Art. 4629. The marital rights of persons married in other countries, who may remove to this State, shall, in regard to property acquired in this State during the marriage, be regulated by the laws of this State" (P. D., 4639).

"Art. 4629*a*. Any married woman within this State may, with the consent of and joined by her husband, apply to the district court of the county in which she may be a *bona fide* resident for judgment or order of the said court removing her disabilities of coverture and declaring her *feme sole* for mercantile and trading purposes" (acts 1911, p. 92, sec. 1).

"Art. 4629*b*. Said application shall be in the form of a petition in writing, addressed to said court, setting out the cause or causes which make it desirable or advantageous to said married woman to be so declared *feme sole*" (*Id.*, sec. 2).

"Art. 4629*c*. Upon the filing of said petition same shall be docketed as in other cases, and at any time thereafter the district court may, in term time, take up and hear said petition and evidence in regard thereto" (*Id.*, sec. 3).

"Art. 4629*d*. If upon a hearing of said petition, and evidence relating thereto, it should appear to the court that it would be to the interest and advantage of the said married woman so applying, then said court shall enter its order or decree declaring said married woman *feme sole* for mercantile or trading purposes, and thereafter the said married woman may, in her own name, contract and be contracted with, sue and be sued, and all of her separate property not exempt from execution under the exemption laws of Texas, shall thereafter be subject to her debts and liable under execution therefor, and her contracts and obligations shall be as binding on her as if she were a *feme sole*. Provided, how-

ever, that no married woman shall convey or encumber her separate property except as now provided by law" (*Id.*, sec. 4).

From The Southwestern Reporter, vol. 192, Opinion of J. Levy on Red River Nat. Bank *vs.* Ferguson, pp. 1089-1091:

"The note sued upon is, so the trial court held, in virtue of the facts, the note alone of the husband in legal effect, and the wife is not bound by it. And the proposition maintained by the appellant is that a married woman, under the present statute, can execute and is legally bound by a promissory note signed by her jointly with her husband.

"(1.) Under the common law a married woman is not bound by a promissory note executed by her jointly with her husband. It is the note alone of the husband. And it is the ruling of the court in this State that article 4624 before amendment did not authorize a married woman to contract a debt except for necessaries for herself or children, or for the benefit of her separate property. Trimble *vs.* Miller, 24 Tex., 215; Covington *vs.* Burleson, 28 Tex., 371; Rhodes *vs.* Gibbs, 39 Tex., 441, and others.

"(2, 3.) Therefore, if the wife has any enlarged power to bind herself personally by a simple note, it would be so because such power of personal contract is conferred upon her by the act of 1913 (p. 61) amendatory of articles 4621, 4622, and 4624, R. S. of 1911. As amended, article 4624 reads:

> 'Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property shall be subject to the payment of debts contracted by the wife, except those contracted for necessaries furnished her or her children: Provided, the wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract.'

"(4.) By the language of the proviso authority is not positively given or reserved to the wife to generally bind herself by personal contract, but she is negatively debarred from doing the things therein mentioned, except in the way provided. And, being expressly debarred from contracting except in the way provided respecting the things mentioned in the proviso, the wife cannot go beyond the powers so conferred upon her, nor outside the way and purposes authorized by the proviso in the article. The wife 'shall never be,' as the proviso says, (1) 'the joint maker of a note,' or (2) 'a surety upon the bond or obligation of another' without the joinder of her husband with her in making 'such contract.' As the wife is authorized, by implication, only to become surety on the 'obligation of another' by 'the joinder of her husband with her in making such contract,' the authority of the wife to become surety for the husband's debt or obligation would not be within the terms of the proviso; for the surety contract for the obligation of 'another' that the husband must assent to the wife's making, and which he must join with her in making, clearly intends to refer and apply to the obligation of some person other than the husband. And neither was it intended by the language of the proviso, we conclude, to authorize the wife to become a comaker or coprincipal with her husband in his note; for joint obligors on a note are, as between themselves, each sureties for the payment of the shares of the others. 1 Brandt on Suretyship (3d ed.), §48. And where the wife and husband merely conjointly sign the husband's note, the undertaking of the wife is in legal effect that of a surety for her husband, which is not within the spirit or purpose of the proviso.

"(5, 6.) Since the terms of the proviso being considered do not extend and have application to the note here sued upon, the authority of the wife to become a comaker with her husband in his note must be determined by a consideration of the amendatory act; for, if a wife is empowered by the amendatory act, considered as a whole, to contract gen-

erally as if she were unmarried, then she may make the contract sued upon. As amended, article 4621 defines the separate property of the husband and wife. The rights of the wife in respect to separate property are placed upon the basis and to the extent of—

> 'the sole management, control and disposition of her separate property, both real and personal: Provided, however, the joinder of the husband in the manner now provided by law for conveyance of the separate real estate of the wife shall be necessary to an incumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her or of which she may be given control by this act.'

"Article 4622 defines the common or community property of the husband and wife. As to such community property it is provided that it—

> 'during coverture may be disposed of by the husband only: Provided, however, the personal earnings of the wife, the rents from the wife's real estate, the interest on bonds and notes belonging to her and dividends on stocks owned by her shall be under the control, management and disposition of the wife alone, subject to the provisions of article 4621, as hereinabove written.'

"And article 4624 has been set out above. By these articles there is clearly conferred upon the wife the authority of management, control, and disposition, with certain limitations, of her separate property. But the phraseology of the entire amending act does not point out nor in words undertake to give to a married woman the right generally to make personal contracts, in distinguishment between contracts of conveyance or disposition of her separate property. And the

language necessary to create and give to a married woman the power generally to bind herself personally as if a *feme sole* is not within the terms and scope of the amending act. Such debts as shall be for the benefit of her separate estate is sense in which the words 'debts contracted by the wife,' as found by the act, were intended to be used. And the act does not provide for the wife's liability on contracts not for her benefit. So, in the absence of a provision to that effect in the amending act, the amending act may not, it is concluded, be construed as of itself intending to entirely do away with the disabilities of coverture and confer full contractual capacity on married women. The act is rendered clearer by a reference to the legislative journals. 2 Lewis' Sutherland on Stat. Const. (ed. 1904), §471; Black on Interpretation of Laws (ed. 1896), p. 224; United States *vs.* Railway Co., 91 U. S., 72; 23 L. Ed., 224; Aldridge *vs.* Williams (U. S.), 3 How., 9; 11 L. Ed., 469. As the bill was originally passed (House Journal, p. 1156), article 4624 provided:

> 'The wife may make any contract which she would be authorized to make but for her marriage, except those herein or elsewhere forbidden, and her coverture shall never be a defense in any suit or action based on such contract, but suits may be brought thereon in the manner prescribed by articles 1840 and 1841: Provided, however, that neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property shall be subject to the payments of debts contracted by the wife, except those contracted for necessaries furnished her or her children: Provided, the wife shall never be a joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract.'

"But a concurrent resolution recalled the bill from the Governor. *Id.*, pp. 1254, 1351. And the bill as finally passed is in its present form. *Id.*, p. 1387. It will thus be seen that all that portion of article 4624 in the original bill which expressly removed the disability of coverture was left out, and the proviso which limited or restricted the right to make certain contracts was retained. If the legislature had intended to remove any of the disabilities of coverture theretofore existing it is not likely that it would have deliberately dropped from the bill language expressive of that intent and retained that portion which could operate to qualify or restrict the new rights theretofore granted. If we confine our consideration to the law as amended in 1913, this proviso in article 4624 is meaningless and would seemingly have no place in the statute relating to married women. If it is to be regarded as a limitation upon the right of a married woman to make contracts, it presupposes the existence of a right which may be thus limited. It must have something to which it can apply. The failure to discover in the amended article or any other provision of the law any right upon which it could operate as a limitation has apparently authorized the inference that it was intended as constructive legislation and designed as an indirect method of conferring the right to certain kinds of contracts. That inference rests entirely upon the ground that unless so considered the proviso is meaningless. But we are not reduced to that choice: for the act of 1911 (Acts 32d Leg. c. 52 (Vernon's Sayles' Ann. Civ. St., 1914, arts. 4629*a* to 4629*d*)), enacted after the codification of that year as a separate statute, provided for the removal of the disabilities of coverture, for certain purposes, and conferred upon married women whose disabilities had been removed the rights of a *feme sole*. As such she might make any character of contracts binding herself personally, except those conveying property. This was a part of the existing law at the time article 4624 was amended, and we must assume that the legislature had it in mind.

Here was a right to contract upon which the limitation in the proviso in article 4624 could operate. A married woman now emancipated from the disabilities of coverture by complying with the provisions of the act of 1911 would unquestionably be subject to that restriction, and cannot now claim the right to make the joint contracts referred to in article 4624 without the joinder of her husband. It is not therefore necessary to give meaning to the proviso that it be construed as indirectly conferring a right upon married women to make such contracts.

"It is believed that the trial court did not err in his ruling upon the facts of this case, and therefore the judgment should be affirmed.

"It is so ordered."

Referring to the act of 1913, since the decision of the Circuit Court of Appeals, and since the writ of certiorari was granted in this case, four of the Courts of Civil Appeals of Texas have construed the act in line with the construction by the Circuit Court of Appeals in this cause.

The Court of Civil Appeals at Texarkana on January 18, 1917, decided the case of Red River National Bank *vs.* Ferguson *et al.*, 192 S. W., 1088, set one herein, and there held that neither before nor since the act of 1913, had a married woman under the laws of Texas power to execute a note jointly with her husband except for necessaries for herself or children or for the benefit of her separate property. The court holds that the proviso in article 4624 was not a grant of power but a limitation on power granted in the act of 1911 to women whose disabilities have been removed by decree of court.

The Court of Civil Appeals at Dallas on January 27, 1917, decided Shaw *vs.* Proctor *et al.*, 193 S. W., 1104, and held that a note executed after the amendment of article 4624 by the wife without being joined by her husband is a nullity,

and she is not legally bound thereon. The decision turned on the meaning of the proviso in section 4624 which reads:

> "Provided, the wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract."

The husband did not join in this note, which was an accommodation note for her son who joined Mrs. Proctor in the execution of it.

The Court of Civil Appeals for the Fort Worth District decided Aiken *vs.* First National Bank of Bridgeport, 194 S. W., 610, on April 28, 1917, holding that the amendment of article 4624 and the associated articles had no effect on contracts existing at the time this legislation was enacted, and announced concurrence in the construction of the statute indulged in Red River National Bank *vs.* Ferguson, *supra*.

The Court of Civil Appeals of the Beaumont District in the case of the First State Bank of Tomball *vs.* Tinkham *et al.*, 195 S. W., 880, construed the act of 1913 as it had been construed in Red River National Bank *vs.* Ferguson, *supra*, and declared its full concurrence in the reasoning contained in the opinion in the Ferguson case.

Neither of these decisions has been examined in the Supreme Court of Texas, nor has the act of 1913 come under the consideration of the Supreme Court of Texas in any reported case or at all so far as we know.

Respectfully submitted,

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